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THE

HISTORY

OF THE

ROMAN LAW

DURING

THE MIDDLE AGES.

TRANSLATED FROM THE ORIGINAL GERMAN

OF

CARL VON SAVIGNY.

By E. CATHCART.

VOL. I.

SHOWING THE INFLUENCE OF ROMAN JURISPRUDENCE ON THE LAWS OF THE NATIONS OF WESTERN EUROPE GENERALLY, DURING THE SIX CENTURIES BEFORE IRNERIUS

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PREFACE.

THE work, of which this is the commencement, was originally intended to form a history of the Literature of the Roman Law, from Irnerius to the present times. The desire of writing on this subject was first awakened in the mind of the author by his worthy preceptor, Weis of Marburg, whose profound learning and extraordinary zeal had been successfully employed, in collecting a valuable library on this department of knowledge. The inclination was farther strengthened, by an acquaintance—with the peculiar spirit of the Glossators, and—with the excellent manner in which Sarti had treated this branch of literary history, at once so attractive, both by its obscurity and its intrinsic importance.

But, however useful such a plan might be

for many purposes, and particularly for academical instruction, it was ill adapted for a Work, intended rather to conduct the reader to new discoveries, than to interest him by the illustration of truths already investigated, and in which, therefore, no other limits could be observed than such as arose from the intrinsic connexion of the subjects. If it really were true, as has been generally believed, that the Roman Law perished with the Western Empire and revived by accident, after six hundred years of neglect, the above-mentioned plan would unquestionably be the best, even for a work of original investigation and independent inquiry. Many, however, have already refused their assent to this alleged subversion of Roman jurisprudence. It might also have been necessary to commence with the time of Irnerius, if, according to a very common theory, the histories of the Law and of juridical literature were capable of being so completely separated, that the one should treat only of the Laws as the origin of right, and the other be confined to the learned interpretations and editions of the original enact-

ments. But, a sifting examination of the true origin of Law will prove this view also to be equally objectionable with the former. Persons, convinced of the erroneousness of both opinions, must at once see the advantage of commencing the present inquiry at a much earlier period, and endeavouring to discover—how the jurisprudence of subsequent times, in so far as its condition depends on Roman influence, has arisen from the legislation of the Western Empire, by mere development and progressive change, without any total interruption.

On the other hand, very important reasons induced the author to refrain, from extending these historical researches to the latest epoch. From the sixteenth century downwards, jurisprudence appears to have undergone a fundamental change,—occasioned, both by the new and preponderating influence of Philology and History, and by the more distinct separation of nations. The stage of events, the condition of the authorities and the mode of conducting the inquiry are no longer the same; and, the history of legal science from that remarkable period is a to-

tally different task from that of recording its character during the preceding times. The account of the juridical literature of later years can only be a fragment; because, existing generations are constantly employed, in changing and maturing the system and the principles, of which the narrator sees merely the commencement.

The manner of conducting the inquiry must also yield to this influence; for, the same reasons, which render any separation among the homogeneous institutions of preceding centuries arbitrary and improper, require, that a history of the Roman Law, during the later period, be carefully separated from that of its earlier condition.

These considerations have led the author to confine his work to the state of the Roman Law during the middle ages exclusively, as forming in itself a complete period, and to abstain altogether from the following centuries. The materials, which have been collected on the History of the Literature of the Roman Law during the subsequent period, particularly concerning the French School, may be afterwards communicated

in some other form. The unity of purpose would also be lost, if the contemporary evidence concerning the condition of the Roman Law in the Eastern Empire, during its continuance, was allowed to enter into the same discussion. The author has therefore restricted the inquiry to the countries of Western Europe. This last limitation is recommended, both by the intrinsic reason already mentioned, and by the example of other writers, who combine the history of the Law under Justinian and his immediate successors, with that of the old Roman Jurisprudence (1).

The history of the Law of the middle ages, according to the principles just laid down, consists of two grand departments, differing in some respects from each other, and capable of being considered as distinct branches. The first of these includes the Six Centuries before Irnerius, in which the uninterrupted continuance of the Roman Law may be proved, although there are only few traces of its

(1) Hugo civilistische Litterair geschichte §. 29. [§. 39. 41. Ausg. 1818.]

scientific study. The second contains the Four Centuries after Irnerius, in which, the culture of the Law as a science and the dissemination of its doctrines, by lectures in the Schools and published Works, form the distinguishing features, and give to this part of the inquiry the character of a literary History of the Roman Law. The former shall be discussed in the first and second volumes, which may therefore be considered as relating to the same period, and as forming, to that extent, a complete treatise.

It was originally the author's intention, to have illustrated separately the Laws of the different people and kingdoms, during the first epoch; but, an attempt to carry this plan into execution showed its impracticability. Certain general points of view were soon discovered to exist, which could only be illustrated in a clear and convincing manner, by a comparative consideration of all, or at least of the principal nations, who overturned the Roman Empire; and, it thus became necessary to separate these pervading features of resemblance from the rest, and to commence with their investigation. The general evidence, in fa-

vour of the continuance of the Roman Law throughout the early part of the middle ages, is arranged in the First volume; and, the Second is devoted to an examination of its condition in the separate kingdoms, during the same period. The Contents of the First volume include the general State —of the Law-sources—of the Judicial Institutions, and—of Legal Education. The common practice of writers has been to limit their attention to the Private or Civil law exclusively; and, this restriction appears to be founded on the fact, that in modern countries, many traces are found of the influence of the Civil and even of the Criminal Jurisprudence of the Romans, while nothing appears to have remained of their internal policy. Thus, any inquiry concerning the permanency of their public institutions was considered to be, beneath the dignity of historical research. If the accuracy of this mode of proceeding were admitted, then, of the three subjects contained in the first volume, the first and third only could be viewed as belonging to a history of the Law of the middle ages; while, the peculiar and close connec-

tion, which such a work has with the second, would stand in need of proof. On the ordinary supposition, that the Civil law of a people is the result of caprice, and is subject at every moment to arbitrary changes, its connection with the history and policy of the nation seems indeed to be very vague: since, that connection is itself shaken by the same accidental and irregularly operating causes. All inquirers concerning the continuance, or existence of the Roman Law, during the middle ages, have proceeded on this assumption, and have considered the law, as an isolated subject, totally unconnected with the condition of the people, whose affairs it regulated. The author has already (1 a) maintained the opposite opinion, and has proved, that all Laws depend more on the ever changing wants and opinions of those who obey them, than on the mere fiat of any legislator. By this conviction, a totally dif-

(1 a) [Both, in a separate Treatise, Ueber Gesetsgebung und Rechtswissenschaft, published in 1814; and, twice since, in the Journal für geschichtliche Rechtswissenschaft, B. 1. S. 373–423, and B. iii. S. 1–52.]

ferent view of the historical evidence is opened up. The inquiry, concerning the continuance of the Law, is now necessarily connected with the existence of the people, among whom that law is said to have been an efficient instrument of controul; and, the preservation of Roman Jurisprudence can no longer be maintained, without previously establishing, as the foundation of that opinion, the preservation of the Romans themselves, and of their public institutions. If the old population were swept away along with the Western Empire, there remained no longer any necessity for the continuance of Roman Law, nor was its preservation possible. The same must have happened, if the former inhabitants had either lost their personal freedom, or their whole property; because, nothing remained stedfast, on which the Roman Law could be grafted. Even, if personal freedom and property had escaped the fury of invasion, while the public institutions alone had been completely subverted, the political system of preceding times destroyed, and the vanquished incorporated with the conquerors,—the Jurisprudence of Rome could

scarcely have withstood the shock of such an overthrow. The Law is part of a nation, entwined with its existence, and abrogated by its destruction. The continuance of the Law, moreover, implies the continuance of the institutions for its administration; and, this reason is particularly applicable after the German conquest; since, the Roman Law could not have been kept in operation under the Germans, without the aid of Roman Judges and Courts. This consideration requires, that even such parts of the following work, as treat principally of Civil Law, should be founded on a knowledge—of the general fate of the Romans, particularly—of their political institutions, and—of their rights of property in land, under the victorious Germans. These researches cannot, however, be properly conducted, without a previous acquaintance with the elements of the constitution, which existed before the subversion of the Western Empire; but, as they possess merely a subordinate interest, the author must limit his remarks to such parts alone, as bear upon the history of the Law of the middle ages.

No period, within the bounds of historical

inquiry, is more interesting and attractive than that, in which the intellectual powers and mental characteristics of the nations ceased to repine in listless inactivity, and came forth in all the freshness of new being, and in every form of a strongly renovated existence. Such times of regeneration form the earliest dates of authentic history, although the origin of each people unquestionably reaches beyond them. The discovery of this fact alone has enabled Niebuhr to penetrate deeper into the secrets of Roman greatness, than was ever done even by the Romans themselves, during the brightest period of their national literature. The middle ages are particularly distinguished, as abounding with examples of this awakened energy and restless enterprise, and must be doubly important and alluring to the present generations; since, a thorough knowledge of their own condition can only be obtained, by a recurrence to its origin. None will deny, that the institutions of modern Europe are composed, for the most part, both of Roman and of German elements, and that the people in the South and West, together with their languages, bear evidence of this common descent. The

manner and the causes of this amalgamation have, however, been only slightly investigated, notwithstanding the numerous important consequences, which might be expected to result from such an employment. Moreover, the very part of this subject, which the author purposes to explore, has been the most neglected; and, the obstacles to his progress have been thus increased, by the solitude of an almost untrodden path of discovery. It was necessary, in the first place, not merely to search for the sources among unwieldy and miscellaneous collections, but to study their meaning and amend their text. The success or failure of such labours depends much upon accident; and, while the imperfect state of the authorities cannot appear to any well informed inquirer, as either extraordinary or deserving of censure, the formation of a pure text, and the recovery of the parts which are wanting, must unquestionably be the gradual result of numerous, united, and persevering researches. In the second place, the manner of viewing any subject is always brought nearer perfection, by increasing—the frequency of public discussions, and—the number of conflicting inquirers. Light is thus

thrown upon many partial views, from which a solitary student, however honest his intentions, could not by any precautions have escaped. Besides these general difficulties, the author could not overlook that personal deficiency, which necessarily arose from his having been, in a great measure, without any intimate acquaintance with the leading authorities on the old German Law-institutions.

The injurious effects of these obstacles and hinderances have, however, been much diminished, by the occurrence of many favourable and propitious circumstances. Niebuhr's Roman History has been already mentioned. How much excitement and ardour may be communicated to the researches of another, by the mere publication of such a superlative work, is more difficult to define than to experience. But, Niebuhr has even promoted and encouraged the following history, both by direct counsel and advice, and, by pointing, from the first, to that plan, which the author's continued study of the sources has since proved to be exclusively the best. Whatever success may crown these researches must be attributed, to this persevering examination of the original authorities;

and, none can believe, without experience, how much the progress of the discoverer is facilitated, by the mere circumstance of showing him early enough the right direction. This remark applies, with particular force, to such of the following arguments as establish the continuance of the municipal institutions of the Romans; since, to Niebuhr the author is indebted for the first hint of their probable permanency. Much aid has also been derived from the kindness and learning of the celebrated author of the History of the German Law. Eichhorn's communications are mentioned as they occur. Finally, the author must express his grateful acknowledgments to James Grimm for information, concerning the contents of several liberaries and particularly those of Paris. Without these notices, the subsequent volumes must have been much retarded. The accuracy and minuteness, which shine so conspicuously in that excellent person's own works, and which can only proceed from a true and enthusiastic devotedness to the subject of his studies, have been, on this occasion, exercised for the benefit of his friend.

The most important Sources and recent authors, which have been consulted in the first and second volumes, ought now to be noticed. It would be premature to extend this account to the last division of the subject; since, both the authorities and literary materials on the history of the middle ages, after the eleventh century, have little or almost nothing, in common with those of the preceding æra.

SOURCES. (2)

I. Laws and Codes.

Of these, there are two general collections of great importance, which must be here mentioned together:

1. Corpus Juris Germanici antiqui ed. P. Georgisch. Halae, 1738. 4to.

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(2) No notice is taken of any authority which is not intimately connected with the author's undertaking. General historical works, therefore, such as Gregory of Tours, Anastasius Bibliothecarius, &c. have been purposely omitted in this enumeration.

2. Barbarorum Leges antiquae ed. Paul. Canciani. Vol. 1—5. Venet. 1781. 1783. 1785. 1789. 1792. fol.

A collection, without plan and arrangement; but, very useful and really indispensable, both on account of the rarity of some of the articles, and from being the only work in which many of them have ever been printed.

The particular ordinances and compilations of laws, shall be noticed, when discussing the history of the nations respectively.

II. Deeds. (3)

A. ITALY.

3. L. A. Muratori antiquitates Italicae medii aevi. Mediolani 1738—1742. 6. Tomi fol.

One of the most important and comprehensive works on the Italian middle

(3) It seems hardly necessary to remark, that the author has no intention of giving a complete catalogue of all the collections of deeds, but of such only as are closely connected with his object.

ages, containing Original Treatises, and an extremely rich collection of deeds. The Italian compilation—" Dissertazioni sopra le antichità Italiane, " ed. 3. in Roma, 1790, 6 vol. 8vo, includes merely Muratori's own Dissertations, without the deeds.

4. Muratori delle antichità Estensi ed Italiane, P. 1—3. ed. 1. 1717. The references apply to ed. Nap. 1776. 4to.

Contains, like the former, historical disquisitions, and important deeds. The first volume only relates to the following history.

5. Ughelli Italia sacra, ed. 2. Venet. 1717—1722. 10 Tom. fol.

A work, devoid of critical discernment, yet indispensable. The deeds, in particular, are printed with great carelesness, and without any distinction between the genuine and the spurious.

6. J. Papiri diplomatici raccolti ed illustrati dall' Abate Gaetano Marini in Roma 1805. fol.

This was designed to form a full col-

lection of all the deeds written upon Papyrus, and to be devoted to them exclusively, — a limitation apparently somewhat arbitrary and ill founded; but in fact of the opposite character. The most important of these Papyrus deeds are from Ravenna and the adjacent country. They extend, likewise, from the fifth into the seventh century; and thus there exists an intrinsic and essential connexion between them. Many of the deeds were never before printed, and others have been first rendered useful, by their union in this work, and by great improvements on their text. Notwithstanding the limited plan of Marini's researches, his deeds are among the most valuable and instructive appertaining to the middle ages; and possess an extraordinary importance in every inquiry, concerning the preservation of the old Roman Law. The Notes, also, are full of information and learning. A particular difficulty exists regarding the Papirus deeds. Their commencements

have been almost universally destroyed, although their conclusions are very often unimpaired. The first part, being written upon the outer surface of the Roll, was easily effaced, while the inner side remained undamaged. From this circumstance, the object and meaning of single deeds, and of preserved portions, cannot easily be determined. Thus, Number 127. was at first considered to be a complete instrument of sale; but, as Marini properly observes, the whole deed of sale has perished, and nothing remains except the subscriptions of a single witness, and of the notary. Both, however, are given in a prolix style, and contain an abridgment of the contract.

7. Monumenti Ravennati de' Secoli di mezzo per la maggior parte inediti. Venezia, T. 1. 1801. T. 2. 3. 4. 1802. T. 5. 1803. T. 6. 1804. 4to. By Count Marco Fantuzzi.

This Collection contains fragments of different magnitude, single deeds, catalogues, and extracts from archives, —in all 865 articles. It commences

with the seventh century, becomes first of great value in the ninth, and concludes in the sixteenth. Regarding the history and antiquities of these times, it contains an incredible quantity of new information, of which, however, only a part comes within the plan of the following researches. The value of this collection is also much enhanced, by continuing, in the order of time, the Work of Marini, and by thus forming a series of deeds, prepared in Ravenna and the adjoining country, from the period of the Western Empire to modern times. There is only one considerable gap in this succession; viz. from the middle of the seventh to the middle of the eighth century; but this deficiency in the eighth may be, in a great measure, supplied from the Codex Carolinus. (3 a) Each volume of Fantuzzi, besides being complete in itself and embracing all the

(3 a) See below, p. 341. n. 122.

centuries, contains, in a long preface, —miscellaneous notices of some of the most remarkable contents, chiefly of a geographical nature, and—several copious indexes, which are indeed very useful, although by no means complete. (4) A seventh volume, intended to contain a General Index, (5) never appears to have been published. Only a few copies of the work were printed; and, not having been an article of trade among booksellers, (6) it is now extremely rare.

8. Codice diplomatico Sant' Ambrosiano delle carte dell' ottavo e nono secolo illus-

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(4) Fantuzzi himself admits this, in T. 4. p. vi., and other places.

(5) T. 6. p. xx.

(6) T. 1. p. IX. T. 4. p. VI. "Dissi già, che non sono venali. Essi sono destinati per la Città di Ravenna, e le altre di Romagna; per pubbliche librarie; per Monasteri, a' quali particolarmente appartengono questi studi; e per qualcuno, che sia decisamente addetto ai medesimi." For a copy of this book, and for several other important communications affecting the sequel of his work, the author is indebted to the politeness of Professor Ridolfi at Bologna.

trate con note da Angelo Fumagalli già abate di S. Ambrogio . . . . . opera postuma pubblicata da Carlo Amoretti bibliot. nell' Ambrosiana . . . Milano della tipografia di Agnello Nobile 1805. 4to.

This Codex contains 135 deeds, between A. C. 721 and 897; all, from the archives of the monastery of St Ambrose at Milan, and consequently all Lombardic. The contents of the deeds themselves, and the great pains which Fumagalli took in procuring accurate transcripts, are the valuable characteristics of this work; for, the editorial department has been slovenly performed. The notes are not of much consequence, and are, concerning the constitution and law, totally useless.

9. Codex diplomaticus civitatis et ecclesiae Bergomatis a Canonico Mario Lupo ej. eccl. primicerio digestus . . . Volumen primum, Praecedit Prodromus historico-criticus . . . Bergomi 1784, ex typ. Vincentii Antoine. fol. . . . Volumen secundum opus posthumum ed. a presb. Jos. Rouchetti. ibid. 1799. fol.

Of the extremely valuable Prodomus,

notice shall be afterwards taken. This Codex was intended to form a collection of all the deeds relative to Bergamo, wherever they might be found, and including even those which had been previously printed. The deeds contained in the first volume extend, from A. C. 740 to 900, and those in the second, from 901 to 1190.

10. Storia dell' Augusta Badia di S. Silvestro di Nonantola . . . opera del cav. ab. Girol. Tiraboschi . . . Tom. 1. 2. Modena 1784, 1785. fol.

The first volume contains the history; and the second, the deeds, from A. C. 753 to 1492.

B. FRANCE.

11. An excellent Catalogue of all these deeds is given by Bréquigny—table chronologique des diplomes, chartes, titres et actes imprimés concernant l'histoire de France. Paris T. 1. 1769 (from 142—1031). T. 2. 1775 (from 1031—1136). T. 3. 1783 (from 1136—1179) fol.

12. Diplomata, chartae, epistolae et alia documenta ad res Francicas spectantia . . . ed. L. G. O. Feudrix de Brequigny, F. J. G. la Porte du Theil. Pars 1. Diplomata etc. Tom. 1. 1791. fol.

The deeds relative to French history formed only a part of the extensive plan of this work. No more than the first volume of deeds, between A. C. 475 and 751, was ever published; and, none of the following collections, therefore, have been superseded by the labours of these compilers. The beginning of Pars 2. (T. 1. 2. Paris, 1791. fol.) contains Epistles of Pope Innocent III.

13. Rerum Gallicarum et Francicarum Scriptores, ed. Martin Bouquet. Paris, 1738, sq. fol.

The only volumes, containing deeds in connection with the following history, are—Tom. 4. 5. 6. 8. 9.

14. Gallia Christiana ed. Dion. Sammarthanus. Tom. 1—13. Paris, 1716—1785. fol.

Each volume includes an appendix of deeds. The work is incomplete. There are still wanting the Archbishop-

rics—of Tours, Besançon, Vienne, and Utrecht. (7)

15. Histoire générale de Languedoc par deux Religieux Bénédictins (Claude de Vic and Joseph Vaissette). Paris 1730—1745. 5 T. fol.

Each volume is accompanied, by a very valuable appendix of deeds. The two first volumes alone relate to the following investigation.

16. Capitularia ed. Baluzius.

The Capitularies shall be afterwards mentioned, when illustrating the Law of the Frank Empire in particular; and Baluzius's Collection shall then be more particularly described. The only part, belonging to this class of authorities, is the collection of deeds, which forms an appendix to the second volume.

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(7) Lelong, bibl. hist. de la France, T. 1. p. 541, mentions only the first twelve volumes. The thirteenth, which has appeared since his time, contains Toulouse and Treves.

C. GENERAL COLLECTIONS.

17. Mabillon de re diplomatica, ed. 2. Paris, 1709, fol.

The sixth book is a collection of deeds.

18. Mabillon annales ordinis S. Benedicti. Paris, 1703, sq. fol.

19. Steph. Baluzii Miscellanea, Paris, 1678—1715. 7 vol. 8vo.

20. Martene et Durand Veterum Scriptorum et Monumentorum amplissima Collectio. Paris, 1724—1733. 9 vol. fol.

21. Luc. Dachery Spicilegium s. Collectio veterum aliquot Scriptorum, ed. nova. Paris, 1723. 3 vol. fol.

AUTHORS.

I. On the Roman Law itself, during the Middle Ages; and consequently, on the immediate subject of the following work.

22. Lex Romana Antonii Dadini Alteserrae. Tolosae, 1641; enlarged and improved, in—Alteserrae Rerum Aquitanicarum

libri quinque. Tolosae, 1648. 4to. Lib. 3 Cap. 5—15.

In this may be found some valuable contributions, regarding the history of the Law in the Frank Empire.

23. Dell' Uso e Autorità della ragion civile nelle provincie dell' Imperio Occidentale dal dì che furono inondate da' Barbari sino à Lotario II. di Donato Antonio d'Asti. Lib. 1. 2. in Napoli 1720, 1722, 8vo. (Second edition, Nap. 1752, 8vo.)

Asti is the first author, who, in a publication expressly devoted to the subject, adopted the true view of the permanency of the Roman Law, and powerfully argued against the prevailing errors. Nevertheless, his proofs are derived too exclusively from Italy; and, in his time, most of the leading authorities regarding that country, were not discovered. Along with this work, may be ranked—the numerous controversial writings of Grandi, Tanucci, &c., on the knowledge of the Pandects and the discovery of the Florentine MSS. Regarding the earlier years, these com-

municate much information, although in a very indistinct and unsatisfactory manner.

24. J. G. Heineccii Antiquitates Germanicæ, T. 1. 2. Hafn. et Lips. 1772, 1773, 8vo.

24. a. The Brussels Prize Essays of the year 1780.

In the year 1780, the Brussels Academy proposed, as a subject of investigation,—the period in which the Roman Jurisprudence had been introduced, and received as law in the Austrian Netherlands. Under the common title, "Mémoires sur les questions proposées en 1780, etc. Bruxelles, 1783, 4to." the four following answers were returned, among others, to that question. They were the Prize Essay, and three Accessit.

F. Rapedius de Berg Mémoire sur la question, etc. (215 pages, besides large tables).

A. Heylen Comment. ad quaesitum, etc. (23 pages).

D'Outrepont discours sur l'autorité du droit Romain dans les pays-bas, (38 pages).

W. F. Verhooven Antwoord op de Vraeg, etc. (62 pages).

The first of these is composed, with incredible labour; but, the author is quite ignorant of the history of the Roman Law, and of historical criticism. The following are its chief contents. Under the Roman dominion, the Gauls always preserved their Native Law, and no part of the Roman Jurisprudence was applied to them, except the ordinances of the general government, the regulations of finance, and a few private enactments, which the Emperor had introduced, for the purpose of improving the Native Law of Gaul. The proper Civil Law existed in Gaul for the Romans only, e. g. soldiers, officers of government, and others, who had been sent from Italy, and who were viewed as foreigners in Gaul, (p. 212). The Franks, at first, allowed this arrangement to continue; but, since the tenth century, the Roman Law fell into oblivion, or was even intentionally prohibited by the kings. Thus, the "Cou-

tumes" were gradually established; and in these, the old original Law of Gaul was preserved (p. 213). In order to prove this, De Berg has most laboriously collected into tables all the imperial constitutions, which were either intended to take effect in Gaul, or which might have had some influence there. In each of these, he strives to show, that no private law is contained, or such only as was intended to modify the native laws. Where neither of these propositions can be established, he adopts a third, and argues, that such constitutions must have been addressed to the Romans settled as foreigners in Gaul. The non-existence of any ordinance, by which it can be proved, that the Roman Law was either solemnly promulgated, or carried into real execution as the Law of the original inhabitants of Gaul, is considered by De Berg as quite decisive of the question. Now, apart from the total disregard of historical evidence, with which he has conducted the inquiry, his principal view is com-

pletely contradicted by a single fact. Among all the numerous "Professiones," which we have before us in deeds and books of forms, there is none of the native Law of Gaul, (whatever that Law may have been); while all are either of the Roman Law, or of the Law of some of the newly settled German races. Even, if all De Berg's arbitrary and unfounded assumptions, concerning the different significations of Lex Romana, were overlooked, this single circumstance is, of itself, sufficient to annihilate his theory. Upon the direct subject of the Essay, his opinions in their results approach pretty nearly to the truth; since Brabant and Flanders undoubtedly experienced the same changes in their Law, as the "Pays coutumiers" of France. In these, the direct use of the Roman Law actually ceased; (7 a) although, the causes of this change were very different from those mentioned in this Essay. In so

(7 a) See below, p. 160. seq.

far as concerns the later centuries, De Berg's labours, on the history of the Law of the Belgic Provinces, are of great value. Even on this subject, however, he falls into a mistake, by maintaining, that the Roman Law was not in any measure revived in the Netherlands, before the end of the fourteenth century. That this event must have happened much earlier is certain; because, there was, from the earliest times among the jurists in Bologna, a Flanders Nation, who chose their own "Consiliarius;" (7 b) and this plainly indicates a long established custom among t e Flanders youth, of frequenting the law preceptors of that place.

The second Essay by Heylen, contains nothing of importance regarding the olden times; but, on the early part of the following epoch, it becomes uncommonly valuable, by the collection

(7 b) Statuta Juristarum Bonon. p. 2. Also, in the catalogue of distinguished scholars of the thirteenth century (Sarti P. 2. p. 234. seq.) there is a Count of Flanders, and several individuals from Tournai, Lille, &c.

and comparison of a considerable number of deeds, which prove the knowledge and use of the Roman Law in the thirteenth and fourteenth centuries; although, upon a more careful examination, a part of these deeds, as containing no sure references to the Roman Law, might be rejected.

The third Essay by D'Outrepont, is remarkably superficial. The author makes the amazing discovery, that the common opinion regarding the established authority of the Roman Law is false, and that his countrymen, consequently, lived under no laws whatever; but, he consoles himself with the reflection, that as soon as the excellent Emperor Joseph shall be informed of this misfortune, he will immediately give them good laws, and perhaps even sanction a part of the Roman Law, when purified from stoical philosophy, &c.; and thus, all things will be again placed in the best possible condition! (p. 1. 2. 38).

The Fourth Dissertation is written in the Flemish language. (7 c)

25. Chr. G. Biener Commentarii de origine et progressu Legum Juriumque Germanicorum. P. 1. P. 2 Vol. 1. 2. Lips. 1787. 1790. 1795. 8vo.

26. K. Fr. Eichhorn Deutsche Staats-und Rechtsgeschichte. Abtheil. 1. 2. Göttingen, 1808. 1812. 8vo.

II. Concerning the public institutions of Gaul, before and after the conquest of that country, by the Franks.

27. Dubos histoire critique de l'établissement de la monarchie Françoise dans les Gaules. Paris, 1742, 2 Vol. 4to.

The leading views of this work are highly romantic and absurd, and Montesquieu had an easy task in refuting them. But many of Dubos's detached opinions are very valuable. The French authors, however discordant their other doctrines may be, agree in the practice of adopt-

(7 c) [See note by Translator, at end of Preface.]

ing each a particular political system, and in viewing all the historical evidence as so many proofs of its truth. In this respect they differ from the Italians, whose researches, for the most part, are guided only by a desire to discover the true scientific result. This may, however, have arisen, from the impossibility of any political interest being felt by the Italians of modern times.

28. Les Origines ou l'ancien gouvernement de la France, de l'Allemagne et de l'Italie, à la Haye T. 1—4. 1757, 12mo. (by Count Büat.)

The Count's views are incomparably less accurate and original than those of the preceding work.

29. Mably, observations sur l'histoire de France. T. 1—4. Kehl 1788. 12mo. The first volume only relates to the following subject.

30. Memoire sur les causes de l'abolition de la servitude en France, et sur l'origine du gouvernement municipal (by Dupuy). The substance of this memoire, itself of no importance, is given in the Histoire de l'Aca-

demie des Inscriptions. Tom. 38. 1777. 4to. p. 196—215.

31. I. N. Moreau principes de morale, de politique et de droit public .... ou discours sur l'histoire de France. Tom. 1—21. Paris, 1777, sq. 8vo.

The volumes 1—12 are historical; and, the first four only of these relate to the subject of the following work. As a whole, the author builds on the assumptions of Büat; and, although his views are often even more shallow than the Count's, many parts of the inquiry are better managed.

32. Théorie des loix politiques de la Monarchie Françoise. Tom. 1—8. à Paris chez Nyon, 1792, 8vo. (7 d)

This work begins with the Roman supremacy in Gaul, and ends with Charles the Bald. The plan is said to be Bréquigny's, but the authoress is Mademoiselle de Lezardiere. Both the plan

(7 d) In Camus (bibliothèque des auteurs de droit,) where the other works are mentioned, no notice is taken of this one.

and the execution are, beyond comparison, more profound and accurate, than those of any of the preceding works; as indeed may be seen from the somewhat troublesome external arrangement. Each division consists of three entirely distinct parts: 1. Discours, i. e. the work itself. 2. Sommaire des preuves, i. e. an enumeration of the proofs, and a notice of their contents. 3. Preuves, i. e. the proofs themselves, which are printed, and furnished with French translations. The efforts of the authoress, to avoid the partialities and prejudices of the authors already noticed, are very commendable; although she is as little free from prejudice as they; and her partialities are not less, but have only taken an opposite direction.

32 a. De la Monarchie Françoise, par M. le Comte de Montlosier. The reader need consult only T. I. Paris, 1814, 8vo.

Montlosier is equally partial and prejudiced with any of the earlier writers, and builds his system entirely upon

groundless hypotheses. This remark applies specially to the period within the plan of the following researches; for, in subsequent centuries, the work is often very alluring and instructive, by the clear views and lively representations of customs and manners.

III. Concerning the Constitution of Italy during the middle ages.

33. Muratori antiquitates,(See above, N. 3). The original treatises only.

These also are very valuable. Muratori, with great diligence and acuteness, first started numerous most important subjects of inquiry, and afterwards brought many of them to a happy termination by his own ingenuity; in which he was certainly not deficient. That success has not more frequently attended his investigations, may have proceeded chiefly, from the immense materials which he had undertaken to publish, and by which he seems to have been often totally overpowered. His own thoughts could only seldom rise above

the burden to free discussion; as is felt too often, in the unsteady progress of his researches, and in his constant alternation between the two opposite opinions. Besides this disadvantage, we must not overlook another, to which he was exposed, in common with most of his countrymen, who have undertaken to inquire into the condition of the middle ages. Muratori limits his views too exclusively to Italy, and neglects the discovery of the common German elements, by a comparison with other nations. Nevertheless, his comprehensive work will always continue, on most parts of the Lombardic Constitution, to be a starting point from which every new investigation must begin. (7 e)

(7 e) [See below, p. 388. Muratori's accuracy, says Hallam, (Mid. Ages, i. 325. Lond. 1826.) is in general almost implicitly to be trusted, and his plain integrity speaks in all his writings; but his mind was not philosophical enough to discriminate the wheat from the chaff, and his habits of life induced him to annex an imaginary importance to the

34. The Prodromus of Lupi—codex diplomaticus civ. et eccl. Bergomatis, (See above, N. 9).

One of the most important works concerning the Lombardic Empire. Several of the constitutional elements have been more profoundly discussed by Lupi than by any other author; and, for the chronology of Lombardic history, no similar treatise exists.

35. Delle antichità Longobardico-Milanesi illustrate con dissertazioni dai Monaci della congregazione cisterciese di Lombardia. Milano Vol. 1. 2. 1792. Vol. 3. 4. 1793, in 4to, (by Fumagalli) (8).

The third and fourth volumes relate mere-

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dates of diplomas and other inconsiderable matters .... His Dissertation on Italian Antiquities, may be considered either as one or two works. In Latin, they form six volumes in folio, enriched with a great number of original documents. In Italian, they are freely translated by Muratori himself, abridged no doubt, and without most of the original instruments, but well furnished with quotations, and abundantly sufficient for most purposes. They form 3 vols. 4to.]

(8) See his Life prefixed to the Codice dipl. S. Ambrosiano, above Num. 8.

ly to the Church, while the first and second treat of the Civil Constitution; and the views concerning its early condition, before the revival of the Lombardic cities, are of little value.

(35 a) Gius Rovelli Storia di Como, P. 1. Milano, 1789, P. 2. Milano, 1794, P. 3. T. i. Como, 1802, P. 3. T. 2. Como, 1803, 4to.

Prefixed to the first and second volumes, there is a copious dissertazione preliminare, on the Public Institutions of Upper Italy. This dissertation, particularly the part contained in the latter volume, where the Constitution is examined from the time of Charlemagne to the fourteenth century, is very instructive and profound.

36. Sismondi histoire des républiques Italiennes du moyen age, 8 volumes 8vo. The first volume was published at Zurich, 1807.

The first volume only of this work embraces the earliest period, to which the following remarks are confined. The free opinions, which Sismondi had the courage to express at a time of general oppression, have been every where re-

ceived with the applause which they deserved. It lay, however, within his plan to consider the Republics of the following period, as perfectly new and unconnected with preceding institutions; and thus, the earlier part of the investigation lost, in his eyes, much of its interest. Yet, even upon this supposition, the attention bestowed upon the earlier period, has been much too slight and superficial. At the time of the composition of Sismondi's work, all the particular authorities were accessible, which can at this day be consulted; and yet he does not appear to have examined any of them. Muratori is almost his only guide, in all that concerns the Lombardic Constitution; and many subjects are treated by Muratori in a much more accurate and satisfactory manner, than in Sismondi's work; which, in fact, gives an altogether erroneous idea of the early part of the middle ages. (8 a)

(8 a) [See below p. 390. Our own great historian of the

Middle Ages, seems to have a better opinion of Sismondi. (Hallam, Mid. Ages, i. 325. Lond. 1826.) 'The publication of M. Sismondi's Histoire des Républiques Italiennes, has thrown a blaze of light around the most interesting, at least in many respects, of European countries during the middle ages. I am happy to bear witness, so far as my own studies have enabled me, to the learning and diligence of this writer; qualities which the world is sometimes apt not to suppose, where they perceive so much eloquence and philosophy. I cannot express my opinion of M. Sismondi in this respect more strongly than by saying, that his work has almost superseded the Annals of Muratori; I mean from the 12th century, before which time his labour hardly begins. Though undoubtedly not more accurate than Muratori, he has consulted a much more extensive list of authors; and, considered as a register of facts alone, his History is incomparably more useful. These are combined in so skilful a manner, as to diminish in a great degree that inevitable confusion which arises from frequency of transition and want of general unity. It is much to be regretted, that from too redundant details of unnecessary circumstances, and sometimes, if I may take the liberty of saying so, from unnecessary reflections, M. Sismondi has run into a prolixity which will probably intimidate the languid students of our age. It is the more to be regretted, because the History of the Italian Republics is calculated to produce a good far more important, than storing the memory with historical facts, that of communicating to the reader's bosom some sparks of the dignified philosophy, the love for truth and virtue, which lives along its eloquent pages.']

Note by Translator.

[W. F. Verhooven discusses the subject in four sections.

Sect. I. The Romans carried their laws along with their victorious arms into the Belgium cities.—Various collections of laws—Code of the Emperor Theodosius, p. 5—11.

Sect. II. Great authority of the Theodosian Code under the Kings of the two first races.—The collection of Justinian, p. 11—20.

Sect. III. The Roman Law among the Counts of Flanders, Henault, Namur, Luxemburg, and among the Dukes of Brabant, down to the year 1425.—Date of the foundation of the University of Louvain, p. 20—40.

Sect. IV. The Roman Law since the institution of the University of Louvain, and how it obtained the force of law in the Eastern Netherlands, p. 40—48.

Regarding the introduction of the Roman Law into Holland, the reader may consult—Henrici Fagel et Johannis Cornelii Van der Hoop Disputationes; prior de origine et usu juris Romani in Hollandia: altera de necessario Romani juris et subinde quoque Canonici juris in Hollandia usu. Hague, 1779, 8vo. and, Verhandeling over den oorsprong en de Historie der Vaderlandische Rechten: insonderheid van Holland en Zeeland door M. Laurens Pieter van der Speigel. Goes. 1769, 8vo.

The following analysis of M. Raepsaet's last opinions on the Legislation of the Gauls, may not be uninteresting. See Nouveaux Memoires de L'Academie Roy. de Bruxelles, iii. 291—314. The Salic and Ripuarian Laws,

as modified by the Capitularies, &c., prevailed over Belgium and France, to the north of the Loire, until the end of the 9th century; and, the rise of Feudalism in the 10th, although in some instances injurious to their influence, did not produce their total abrogation. In the cities, these Codes were used until about the end of the 12th century; when, customs exceedingly diversified, but often founded on them, supplied their places. These customs in Belgium, having been partly reduced to writing in the first charters and immunities (Keuren) of the cities, reference to the Salic and Ripuarian collections was entirely superseded. The doctrines of law embodied in these early Keuren resemble the ordinances of the old Codes. The laws of these first charters consist, for the most part, of Frank and German customs—of capitulary enactments —and of Roman ordinances. The second Keuren which conferred the full rights of municipal freedom (Poorterye) on the citizens of Belgium, took the laws of the old Keuren for their basis, with such changes as the times required, and the now renewed study of the Roman Law suggested. Indeed, the students of law who returned from Bologna, and the renown of the Italian cities in Tuscany, along with the increased knowledge and opulence of the citizens, and the policy of the princes, led chiefly to this innovation. See M. Raepsaet's other Memoirs, in the preceding volumes of the same transactions; and his work entitled—"Analyse de l'Histoire des droits civils, politiques et religieux des Gaules. Gant. 1824." Regarding the French cities, see below, p. 308, &c.

The barbarian conquerors seem generally to have taken

possession of the open country, both as being more accordant with their habits, and as less capable of resisting their attacks and to have regarded the cities, either as objects of plunder, or sources of tribute. The already established fiscal system of the Romans, could scarcely be rendered more oppressive; and the condition of such cities as withstood the first attacks, seems in this respect to have been improved under their new rulers. By the comparative civilization of the inhabitants of the old cities, the victors, being induced to change their mode of life, either joined the old citizens, and thus influenced their constitutions and laws, or founded entirely new Villæ, under their own system and officers. In the former class, Roman institutions were preserved, to a certain extent; while the latter were influenced by the old Germanic doctrines.

There were in Germany two classes of cities before the 12th century. (1.) The Roman civitates, and (2.) the Germanic Villæ. Before Charlemagne, the most usual Villa consisted of communities of free proprietors, under the old Germanic system. The subsequent changes in the rights of property, produced the Villa Indominicata, when large, styled Curtis, which might not only contain bond inhabitants, but also communities of free proprietors. In the proper Villa Indominicata, the Feldmark, or district and the villa belonged in full property to one person; and then the law of the liege lord, (Hofrecht), was quite uncontrolled. On the other hand, his legislative will might be variously checked, according to the spirit and power of the free communities. At the end of the 10th century, the laws of the cities seem to have been a mild species of feudalism.

Before the 12th century, a third change happened, by exempting the villa from the adjoining jurisdiction, and giving it a jurisdiction of its own. This innovation was called Weichbildrecht, from its having originated in the Bishop's villa, who marked or consecrated the boundaries of the independent jurisdiction, by images of the saints. Still, the new jurisdiction continued feudal; and, if the free communities had been able to maintain themselves, they were judged by their own functionaries; while the affairs of the rest of the inhabitants were regulated by the officers of the liege lord. In some of these cities, a council seems to have gradually arisen. The officers of the free communities, who were chosen by the communities, became the councillors, and the superior's bailiffs, appointed by the superior, formed the magistracy. The full municipal freedom was acquired, when, at a later period, the powers formerly belonging to the liege lord and his bailiffs were vested in the council.

On the division of property after the conquest, few of the Roman cities escaped the influence of the free Germanic and bondage-institutions. These, to a certain extent, predominated in all, although without crushing wholly the remains of municipal freedom. In several old Roman cities, particularly in Cologne, the influence of the Curia was preserved; but, as might be expected, with greatly impaired powers, amounting indeed to little more than a control over matters of internal police. This was called the Libertas Romana, or Jus Civitatis. The incorporated trades also never seem to have been bondmen in Cologne, as under the German and feudal system. Nearly the same re-

marks apply to Ratisbon and Treves. The Curia seems also to have been preserved in all the cities on the Rhine and in the south of Germany, under the name of Hausgenossen, (familia). These were a corporation; and, by feudal usage, the superior was bound to choose all the city functionaries from them.

The possibility of a Council emanating from the German and feudal systems, has been already admitted; but many villæ, having the mere Weichbildrecht, received, at the beginning of the 12th century, the Jus Civitatis, or Libertas Romana, at once, by particular grant, and not by gradual development. The Episcopal and Royal cities had the Weichbildrecht. This, although still a kind of feudalism, paved the way for receiving the Jus Civitatis from the originally Roman cities. By the old Germanic constitution, the citizens, if we may use that term, were freemen. By the feudal customs, they were vassals. By the Weichbildrecht both classes were in some degree amalgamated and enabled to strive together in shaking off the feudal oppressions, and obtaining councils. Councils were formed for the most part before the middle of the 12th century; and all the grants of the Jus Civitatis are taken from Cologne, and consequently all are imitations of the Roman.

The extraordinary resemblance which our own municipal institutions bear to the Roman, even in the circumstance of their peculiarly aristocratic character, must be at once apparent; and, it would be a subject of the most interesting historical research, to collect and arrange the scattered probabilities in favour of their Roman origin. The long abiding sovereignty of Imperial Rome over the ancient Bri-

tons,—the consequent civilization flowing from that influence,—the establishment of Roman civic communities and Roman law,—the permanency of these corporations in the other provinces of the Western Empire,—the early traditions regarding the origin of many of the present cities,—the statements in ancient records concerning the prevalence of the Lex Romana,—passages in the Leges Burgorum, &c. &c., and the study of the Roman Law in York, A. C. 804, might all serve as guides through the labyrinth, or as gleams of light across a path of admitted difficulty and danger. On the other hand, the peculiar character of the Saxon and Caledonian invasions, and the darkness enshrouding the early periods of British history, damp the hopes which the former circumstances had just awakened, and chill the inquirer's energies almost at the moment of their birth. Unquestionably, however, Whitaker has shown, that the current accounts of the Saxon conquest are in many respects erroneous: although, without doubt, the victors subverted the Laws and institutions of the Provincials whenever these interfered with their own customs and policy. Indeed, if the numerous armies which overran France and Italy, left so many old Roman institutions and rights of property unimpaired, there is something apparently incredible in asserting that they were utterly annihilated in Britain by a comparative handful of invaders—too few, even to overawe a people, long accustomed to submission. Among the Saxons, we find all the general features of the Germanic policy, and no other branch of the same race ever waged that exterminating war against Roman institutions and Provincial Romans, which

the successive followers of Hengist and Horsa are alleged to have unceasingly and indiscriminately done.

The full establishment of the Roman civic system in Britain, at the date of the Saxon invasion, is a matter of which none can doubt. Britain contained 140 cities, towards the close of the first century of the Christian era. From Richard's Itinerary, which is earlier than that of Antoninus, and refers most probably to a period between A. C. 138, and 170 —there were in Britain two Municipia—York and Verulam; nine Coloniæ—Colchester, Richborough, London, Gloucester, Bath, Caerleon in Monmouthshire, Chesterford near Cambridge, Lincoln and Chester; and ten cities with the Jus Latinitatis (see below, p. 55. 58.)—Carter near Peterborough, Inverness, Perth, Dumbarton, Carlisle, Salisbury, Cirencester, Catarick in Yorkshire, Slack in Longwood, and Blackrode in Lancashire. The number of cities must have increased during the subsequent period of the Roman supremacy; and Nennius says, that twenty-eight of them remained, in the 7th century (Gale. Hist. Brit. 1. 135.) From the remains of an inscription, preserved by Horseley, we know, that Volantium or Elenborough in Cumberland, had a council whose members were styled Decurions, and that they held their assemblies in a public building erected for the purpose. In York also, there were probably Duumvirs or Quatuorvirs, as appears from a mutilated inscription, also preserved by Horseley. The practice mentioned on p. 46 of the following History, is specially prohibited in A. C. 319, with regard to the Decurions of Britain. (Cod. Theod. xi. vii. 2.) Early in the 3d century, the British Provincials were Christians, and three British

bishops attended the Council of Arles in A. C. 314. The withdrawal of the Romans may have broken down the frame of government, which immediately depended upon the Roman officers, but could scarcely of itself unhinge any of the parts of that municipal system, by which many of the cities had, during centuries, been trained and taught and accustomed to govern themselves. The first great eruption beyond Severus' Wall, took place in A. C. 446, but the invaders were repulsed by the Provincials themselves; and being again defeated in A. C. 448, by the united forces of the Provincials and Saxons, the Scots and Picts never again attacked Valentia. The Angles, who invaded the north of England, about A. C. 449, were so far from being able to annihilate the Provincials, that they were themselves defeated and subdued by them, before A. C. 508. After 40 years of peace, Ida, a comparatively mild and enlightened leader, landed at Flamboroughhead in A. C. 547, and before 560, the Saxons of the North, or Northumbrians, had gained possession of all the country between the Forth and the Humber. The character of this invasion was by no means peculiarly devastating, and a community of faith between the victors and the vanquished, must have improved the condition of the latter. In A. C. 627, Edwin King of Northumberland professed the religion of the conquered, which the Saxons had always tolerated, and was baptized in the old Roman Municipium of York, where we know that the Roman Law was taught even 200 years later. The earliest Anglo-Saxon laws contain so few ordinances regarding the private rights of individuals in civil business, that other regulations must have existed in the cities, and where-

ever commercial intercourse had awakened or kept alive the faintest sparks of civilization. The enactments of the great Alfred, about the close of the 9th century, notwithstanding his acquaintance with Frank institutions, were little more than a revision of the laws of Æthelbert, Ina, and Offa, and are, like their prototypes, very sparing in the definition of civil rights. Even the ordinances of Canute, who first attempted an uniform legislation for England, leave much to be supplied regarding private law, by the judgments and courts of the different local jurisdictions. Both Bede and the Saxon Chronicle, notice the existence of the Romans in the 8th century, as a distinct nation, under the names of Latini and Boc-ledene. A statement in the Laws of Ina, in A. C. 668, would even lead us to believe, that the Romanized British had been allowed to retain portions of their estates, although we are ignorant of the mode of division which had been adopted. (See below, p. 279. 283. 294. 315. 380.) We are also informed by the laws of Edward the Confessor, that during the reign of Ina, the conquerors intermarried with the vanquished, and became as one people.

During the civil dissentions, which prevailed in the north of England, the old warlike race of Frontier Provincials may have been enabled to maintain, within the walls of their cities, branches of their former municipal system: and, the fugitive Danes, who were long incapable, from the smallness of their numbers, of making a conquest of the country, flying to the cities for protection, enabled several of them by their power to molest and endanger even the general government of the Heptarchy. Lincoln, one of the five burghs A. C. 941, is known to have been a Roman Colonia in the 2d cen-

tury. Since the invaders neither new peopled their conquests, nor destroyed all the Roman cities, the old civic system must have been allowed to continue, for, the Saxons had no municipal policy of their own, by which it could be superseded, and had long a violent antipathy to residence in cities. The instantaneous abrogation of the whole Roman system, and the introduction of the rural hundred policy into the cities, implies, either that the cities were immediately peopled by Saxons, or that the old inhabitants were at once raised to the rank of Saxons, and admitted to a full participation in all the rights and privileges of the conquerors. There are no reasons, however, for maintaining either of these suppositions. Besides, from the earliest times, notices occur of city jurisdictions separate and distinct from those of the proper Saxon tything or hundred. L. L. Loth. et Eadr. 16. (A. C. 678—685.) L. L. Inæ. 25. 45. (A. C. 688—728.) The cities which had been sacked by the Danes, were rebuilt by Alfred. L. L. Alfred, 36. (A. C. 872—901.) L. L. Edw. 1. (A. C. 901—924.) L. L. Athels. prof. & 12. 14. (A. C. 924—940.) L. L. Edm. 2. (A. C. 940—946.) L. L. Edg. 5. and Suppl. (A. C. 959—975.) L. L. Athelr. 6. and Concil. Wanet. §. 1. (A. C. 979—1016.) L. L. Sæculares Canut. ed. Rosenvinge. 7. 24. 66. 129. 130. 131. 132. 133. (A. C. 1017—1035.) In these last laws, the citizens are expressly said to be the perpetual proprietors of their lands, and to have the rights of confiscation, fining, &c. over the extent of the city jurisdiction. In the laws of Edward the Confessor, (A. C. 1042—1066,) which were confirmed by William the Conqueror, and which may be viewed as a summary of the previous laws and customs of the kingdom, notices occur regard-

ing the municipal system. L. L. 12. 19. 35. 38. 39. In 1039, it required three dukes to punish the old Roman city of Worcester; and, even the presence of William the Conqueror was necessary, before the citizens of Exeter could be reduced to obedience; although, William had the council on his side. Many other instances of the importance of particular cities in earlier times might be quoted.

In the second chapter of the following work, the reader will find an ample description of the system which existed in the cities of Britain, when the Romans left the island. Of the destruction of these civic institutions, there is not only no account, but many of the old Roman cities are existing to this day, and the origin of their systems, so strikingly Roman, clearly reach beyond what is called the dates of their earliest charters, which, in the majority of cases, are mere written confirmations of rights, long previously established. Indeed, the value of writing as a means of proof, and the fashion of employing it for that purpose, together with the increased influence of the Crown and of feudal institutions, may have been, in many cases, the only cause of applying for these charters. On the system, thus sanctioned by the different monarchs, there is a remarkable uniformity and sameness, which, notwithstanding occasional variations, shows its descent from a common origin.

The notices in the Doomsday Books, although chiefly fiscal, prove the long established existence of cities, with numerous burgesses who paid their taxes for the crown lands to the king, as in the time of Theodosius, and as corporate bodies enjoyed property from which revenue was paid to themselves, &c. &c. For example in Ipswich, we find some citizens paying the land-

tax, and others paying the capitation-tax. It would require much space to make a full use of these Doomsday notices but, there is a distinction between city property, Hospitata and Inhospitata, which ought even at present to be noticed. The Inhospitatæ, in the old Roman Municipium of York, paid tax, and are distinguished from the Vastatæ and Vacuæ, which paid none. In the fourth century, possession of city property was the necessary qualification of a citizen; and the quantity of land in property, or of domain lands in farm, "coloni rei privatæ," which ought to be possessed by a Decurion, is expressly stated. The way being thus paved for becoming a Decurion, "possidendi conditione," the right itself might be acquired, (1.) originis gratiâ, or (2.) incolatus gratiâ, i. e. by hereditary descent in the native city, or by the election of the other Decurions in the city of the domicile. The constant object seems to have been to confine the citizens to their own cities, where their property lay, and non-resident citizens might be subjected to the burdens of both their birth—and domicile—city. Thus, there came to be two divisions of taxable city property, the one belonging to the resident citizens, and the other occupied by the tenants of the non-resident. This distinction still appears in the Doomsday reports; the Hospitatæ lots paying more than the non-hospitatæ. Farther, we know, that in the fourth century, the Decurions frequently deserted their property altogether, (see below, p. 26.) and the Doomsday returns notice also the vastatæ or vacuæ.

While the old Saxon legislation contained no ordinances capable of superseding the city constitutions and laws, the Doomsday notices and first charters imply the existence of such in-

dependent civic jurisdictions, although none of them enter into details, or do more than generally confirm the liberties and immunities already existing. King John granted to Hartlepool, the constitution and laws of Newcastle-upon-Tyne, perhaps, one of the seven burghs and, from this hint, we are enabled to acquire a tolerably perfect acquaintance with the details of the municipal system and customs, then and previously prevalent in some of the cities of Britain. David I. of Scotland collected the borough laws of his kingdom, then including part of the North of England, where the Roman remains have been found in the greatest abundance; and this collection bears to have been made at the above mentioned city, on Severus' Wall. The fact of David having made a collection of the Borough Laws, is undoubted; and the character of those now attributed to him, is also admitted to be essentially genuine, although all must regret that a pure text of the L. Burgorum is not yet in the possession of the public.

The Leges Burgorum contain the account of a very advanced and complete state of municipal freedom; not unlike the privileges of a British city free of Italy, when the Romans left the island. (See below, p. 57.) The parallel of course cannot be complete in all its parts; indeed, such a full resemblance would be against the authenticity of the Leges themselves; but there are some striking coincidences, even after admitting that Councils might, in certain circumstances, arise from the union of the free communities, and the officers of the liege lord; and, the very discrepancies are such, as previous reasoning might have enabled us to anticipate.

The Leges Burgorum include the privileges contained in the first Keuren of the Belgium, and in the early

Weichbildrecht of the German cities. Moreover, these laws describe a system even more municipal than that contained in the latter Weichbildrecht of the German cities, after its principles had been extended, by the imitation of the Cologne Jus Civitatis, or Libertas Romana. In one sense, the cities are villæ indominicatæ, and contain full evidence of the development of the feudal system; while the ordinances of the liege lord are totally excluded by the courts, laws, and magistrates of the citizens themselves. Many rules in the adjacent feudal jurisdictions have found their way into the municipal courts, with the consent and approbation of the citizens themselves: but, besides these, the Leges often contain old Germanic, Anglo-Saxon, or Danish doctrines, and a considerable proportion of Roman.

The constitution and judicial system of the L. Burgorum might be produced, by the union of the Roman Ordo with the old Anglo-Saxon system, but not with the feudal system alone. Any combination of the two latter exclusively, seems also incapable of producing the arrangements said to have prevailed from time immemorial in the northern cities of Britain.

Besides the Castellani, Ministri Regis, Comites, Barones, Libere tenentes, Rustici, rure manentes, Uplandensis, Milites, and the Homines, servi, nativi; there are mentioned in the Legis Burg. (A) the Probi homines, Homines villæ, Fideles, (B) the Burgenses, Liberi homines, Homines villæ, legales fideles homines (C), the Præpositus, Ballivus, Judex, (D), the Præco, Serjandus, and (E) the Bedellus. The class (A) formed the Consilium communitatis (L. Burg. c. 102.), and the class B,

the rest of the citizens. The functionary marked C, was chosen by the council from among themselves, once each year, (c. 77.) which gave rise to the legal period of a year and day. While the jurisdiction of the Duumvir was restricted to the "Metas propriæ Civitatis," that of the Prepositus was similarly bounded. His criminal jurisdiction was limited, (c. 6. 19. 132. &c.) and sometimes he had the right of conducting only the preparatory procedure (c. 62. 80). His jurisdictio Contentiosa was considerable, but restricted, and in such a manner, that the parties might waive the objection. (c. 4. 6. 33. 41. 42. 46. 51. 57. 61. 81. 82. 85. 101. 105. 112). The Prepositus possessed also the voluntaria (c. 56. 127.), and police control (c. 21. 39. 40. 74). He appointed tutors (c. 85), was competent in the actio familiæ herciscundæ (c. 124), and possessed the right of mulcta, &c. (c. 104). (See below, p. 40). He proceeded in all matters by the advice and direction of the Councillors, who were his assessors (c. 77. 81). His powers were greater than those ascribed to the Duumvirs in the Pandects (c. 101. 111). The Council was thus a court of justice, and possessed both the Jurisdictio contensiosa (c. 33. 51. 77. 81. 82. 112. 131. 136.), Voluntaria (c. 94. 114. 123.), and police inspection (c. 67). The old Metatores or Lineatores have also been preserved, and they were appointed by the Prepositus, (c. 102.) who was accountable for misconduct to the king. (c. 21.) The Decurions were not bound to appear "ultra terminos propriæ civitatis," and in like manner the citizen "non placitabit extra Burgum." (c. 7.) The rule of the only constitution regarding the bounds of the civil and military jurisdictions, preserved in the Theodosian Code, is followed in the L. Burgorum,

viz. That in no civil cases shall the privatus or citizen go before a military judge (c. 7. 55. 61. 116.), and that the military commander had the right of judging in criminal matters only when the accused was a soldier (c. 49).

The resemblance between these ordinances of the Leges and the old Roman system of Curiæ, Duumvirs, &c. is remarkable; and the coincidence becomes still more striking, when we find, that the cities of Britain had a functionary similar to the Defensor, and chosen in the same manner: i. e. not from the Councillors, Decurions, but from the citizens exclusively. This officer was styled Præco, Serjandus, and was appointed, like the old Defensor, for the sake of protecting the citizens, and preserving the municipal constitution from encroachment (L. Burg. c. 75. 76). To this municipal constitution all the citizens owed obedience and protection (c. 122). The Præco, like the Defensor (below, p. 71.) had not the right of mulcta (c. 104). The citizens accused of crimes might, in certain circumstances, be imprisoned in his house, until trial (c. 80.) Since the possession of taxable city property conferred the rights of citizenship, the Præco attended at the ceremony of transferring it (c. 136.), although this was sometimes performed before the Præpositus (c. 56.), at first within the house where the council met, (See below, p. 327, seq.), and afterwards in the open air (c. 114. 136.), in presence of the Præpositus and 12 citizens (c. 127.), without any written titles to the parties themselves (c. 127.), excepting such as were derived from a reference to the court books of the Curia. (c. 136.) The form of recovering possession in this last chapter, although only from a tenant, was probably the same that was followed in c. 101, and bears so strong a

resemblance to the old Roman process of vindication, that there can scarcely be any doubt of its Roman origin.

The possession of city property still continued the qualification of citizenship, and the non-resident were deprived of advantages, except in the city where their property was situated, (c. 13. 43. 108.) Besides the Jus retractus (Feudorum. ii. 3. 81.), the old restrictions on the alienation of this property have been also preserved, under certain modifications. (Cod. Theod. xii. 3. 1. and 2., compared with L. Burg. c. 115, &c.) The connexion between this property and citizenship was so strong, that both in the Cod. Theod. (xii. 1. 124.), and in the L. Burg. (c. 44.), the husband of an heiress acquiring this property after her death, enjoyed the rights, or was exposed to the burdens of citizenship; and descent through the female alone, might also confer the rights of citizenship, as was at one time the case under the Romans.

Numerous other points of resemblance will occur to all who have paid the least attention to the subject, and many of Savigny's readers, will, it is hoped, feel an inclination to follow out the subject for themselves. On this account chiefly, the Translator has been induced, rather prematurely and out of place, to throw together, in a note, the preceding brief and incomplete suggestions. While the authority of the Saxon codes prevailed over the greatest part of the country, and may have been paramount, numerous doctrines of the Roman law appear to have existed in several cities of Britain, during the early part of the middle ages, along with portions of the old Roman civic system. (See below, p. 276, seq.) To this conclusion, Whitaker would certainly have arrived, if Savigny's

labours had preceded his own. The Roman Law in the Leges shall be afterwards examined; but the prosecution of the subject must be suspended, as being more connected with the sequel of Savigny's work, and as tending too much to localise the general historical interest of the present volume.

This seems to be the best opportunity for stating, that although a faithful version has been attempted, the different characters of the two languages forbade all endeavours to equalize, by a scrupulously literal translation, the number of German and English words in each sentence. While not a few mistakes have been corrected by the kindness of the author himself, many, it is feared, yet await the correction of a discerning public. Besides the ordinary duties of translation, it was thought of importance, in a work of original research like the following, to add a Marginal Index, and to verify the references—a task, which has been fulfilled to the extent of nearly seven-eighths of the whole, not without considerable trouble. The Translator has presumed to offer a few opinions, which are enclosed within [ ]. The rare exercise of this privilege has saved him, it is hoped, from the charge of presumption, and from the disagreeable duty of showing the fallacy of many doctrines, espoused even by our principal writers, on subjects connected with the middle ages. When the editions used are different from those referred to by the author, the circumstance is marked. The changes on the original, prepared by the author himself expressly for this translation, are liekwise noted, and all the Author's most recent corrections have been inserted in their proper places.]

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CHAPTER I.

LAW-SOURCES IN THE FIFTH CENTURY.

CHAP. I

The States of the Middle Ages connected with the condition of the Roman Empire, before its dissolution.

THE law of a people, like the language, cannot be conceived as continuing in an unchangeable condition; since its very existence implies a state of uninterrupted cultivation and development. In this work, consequently, which is intended to elucidate the fate of the Roman Law during the Middle Ages, we must inquire, what particular form that law assumed among the different nations at different times. Such an investigation, however, requires the previous examination of some general principles. The states of the Middle Ages, into which the Western Empire was dissolved, are intimately connected with its condition before this dissolution. It must, therefore, first of all, be as-

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certained, what was the form which the Roman Law had assumed in the Fifth Century of the Christian era. And in order to do this properly, it will be necessary to commence with a short review of its earlier history.

The Roman Law, at first, consisted of Customs and Forms.

The oldest law in Rome, as among all nations, was founded on the common understanding and consent of the people, without any other apparent basis; and this we are accustomed to call Consuetudinary Law. The changed political relations of the different orders of society, and not discontent with this condition of the law, occasioned, at a very early period, a grand fundamental ordinance, which, besides the constitution of the State, contained a great part of the old customs. (1) In this sense, the Twelve Tables preserved the original principles of the Civil Law; and such continued to be their character until the time of Justinian. Much, no doubt, had been changed, during the period of the free Republic, by direct enactment, or by mere custom. The peculiar practice and application of this old law depended, for the most part, on a series of symbolical acts of accurately determined form. These were the principal studies and employments of the most celebrated Jurists, and the subjects of the first

(1) Niebuhr Römische Geschichte, Th. 2. S. 46 Sq.

juridical works. Indeed, the Jurists may be considered as the true guardians and protectors of the strictness and distinguishing features of the old law.

And, at the end of the Republic, of the Twelve Tables, and the Edict.

But, when the Roman people extended their dominion over the whole of Italy, and even over remoter lands, their old strict and unpliant character lost its more rigid peculiarities. This necessary adaptation to circumstances had its effect also upon the law. Besides the old national Jus Civile, the Romans were early obliged, by their intercourse with foreigners, to receive, and to carry into practice, a general and natural law, called the Jus Gentium. This was, at first, merely for the use of foreigners, and was, therefore, even in Rome, at an early period, administered by a separate Prætor, just as it was subsequently in the provinces by the Roman Governors. In consequence of this change in the character of the Romans, their peculiar law always continued to assume a greater resemblance to this general law; and even for the Romans themselves, the Jus Gentium acquired, along with the Jus Civile, an increasing authority. The edict of the Prætor principally contributed to produce and to regulate this transition; for the Prætors and the Jurists strove to influence, in two very opposite directions, the character of the law. The Jurists endeavoured to preserve the strict

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forms of antiquity, while the cautious introduction of the new system became the peculiar duty of the Prætors. The two principal written Sources of the Law, at the end of the Republic, were therefore the Twelve Tables and the Edict.

The old Jus Civile gradually blended with the Jus Gentium.

Under the Imperial Government, the old Jus Civile was still for some time maintained in its earlier condition, and extended and made more precise by the ordinances of the Comitia, or of the Senate. But, as every thing in the new constitution contributed to subvert the original character of the nation, the influence of the Edict became daily more important. The greatest change of all, however, took place in the situation of the Jurists. The law had now so much lost its earliest character, that the application of the original and dissimilar authorities to particular cases, in practice, had become a very difficult employment. Prætors and Judges could no longer refer directly to the Sources, and a systematical arrangement of them was become indispensable for the practitioner. Fortunately, both talents and inclination were found to supply this want. By intercourse with Greece, an earnest desire to explore all branches of knowledge had been awakened at Rome; and, it is impossible to conceive, that Jurisprudence alone should have been neglected, when, upon that very subject of human

knowledge, more than upon all the rest, a rich national store of materials existed. There could also be no scarcity of persons qualified to undertake this new occupation. During the existence of the free Republic, Eloquence and Jurisprudence were, besides War, the only paths to favour and renown. (2) Eloquence, the first among the arts of peace during the period of freedom, had lost, since the downfal of liberty, all honour and influence. (3) In the Law, on the other hand, more of old Rome had been preserved than in any other branch of public affairs. Consequently, he who still possessed the feelings of a Roman, must in the Law have found the most congenial subject; and the noblest intellects must thus have been devoted to the study of Jurisprudence. In this manner, many favourable circumstances contributed to place that science upon the elevation which it occupied during the second and third centuries, and to raise it higher than it has ever been in any other age or among any other people. But this solitary instance of highly cultivated science, could not long survive

(2) Auct. de Caussis corr. eloqu. C. 28. ad. fin.; "Artes honestas, et, sive ad rem militarem, sive ad juris scientiam, sive ad eloquentiam inclinasset."

(3) The work, De Caussis Corruptæ Eloquentiæ. is a remarkable exemplification of its decline.

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the general decline. Soon after Jurisprudence had reached the highest point of cultivation, all activity and progress in the study ceased. The works of the great Jurists, in the times of Caracalla and Alexander, must have enjoyed, independent of their intrinsic worth, an unlimited authority; since they might almost be considered as closing the series of writings on the Law. The incapacity, however, to consult directly the Sources, without the aid of explanatory Treatises, increased, in the same degree, as inclination and power to conduct proper scientific investigations declined.

The Constitutions of the Emperors an important Law-Source.

The Constitutions of the Emperors were now added, as a new class of Law-Sources, to those already mentioned. During a long period, these were, for the most part, rescripts, or explanations declaratory of the existing law, given in answer to questions from Magistrates or private persons, and resembling, in substance, the Responsa of the Jurists, but of greater authority. Under Constantine, however, legislation assumed a new character. From that time, the Edicts, or new Ordinances of the Emperor, were very frequent, and produced often very important changes. The acknowledgment of Christianity to be the religion of the state, must necessarily have annihilated many old national characteristics. The same difficulties did not attend the use

of these new law-sources as had interfered with the direct consultation of the old authorities. Arising from the views and wants of a present time, they were readily understood, and of easy application; and, in them, was found no trace of that subtile treatment of the law which occurred in the Prætorian Edict, and by which the difficulty of consulting the original sources was not unfrequently increased.

The condition of the Roman Law at the beginning of the Fifth Century.

In the beginning of the fifth century, the following was the condition of the Law-Sources.

Theoretically, they consisted of the old enactments of the Comitia, the Senatus Consulta, the Edicts of the Roman Magistrates, the Constitutions of the Emperors, and the unwritten customs. Nevertheless, the Twelve Tables were the basis of the whole, and all later changes might be referred to them as either additions or modifications.

Practically, however, the writings of the great Jurists and the Constitutions were alone consulted as authorities; and thus, the already mentioned obstacles in consulting the old Law-sources were avoided.

Its Practical Utility much promoted by the Constitution of Valentinian III.

But, in the place of these difficulties, others had arisen; some affecting the use of the Jurists, and others that of the Constitutions.

The Jurists had, indeed, done much for the Judges. By their works and commentaries,

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they had made accessible, even to the illiterate, the whole mass of the old law authorities. It was no longer necessary for the Judge to inquire—how a passage of the Edict bore upon an ordinance of the Twelve Tables? The present state of the law might be learned from Ulpian or Paulus. But no where could a work be found, which combined the various opinions of the Jurists into a simple system. Their writings were very numerous and important. To possess them all, or the greatest part of them, was, on account of the expense of copies, particularly difficult;—and to comprehend their genuine spirit, in an illiterate age, was quite impossible. The great Jurists entertained, on many subjects, very different opinions; and who possessed the power of reconciling these differences by a judgment of higher authority? The decision of lawsuits, in these circumstances, must infallibly have been either exceedingly difficult, or unsteady and arbitrary. The celebrated constitution of Valentinian III. A. D. 426, was intended to remedy this inconvenience. It regulated the practical authority of the Jurists, originally, in the West; but afterwards, by adoption into the Theodosian Code, also in the East. (4) All the works of the five Jurists, Papi-

(4) L. un. C. Th. de resp. prud. (1. 4.) Concerning the different interpretations, see Hugo Rechtsgesch. Berlin. 1824. S. 858. The inquiry itself does not belong to our present purpose.

nian, Paulus, Gajus, Ulpian, and Modestin, received the sanction of legal authority, with the exception of the Notes of Ulpian and Paulus on Papinian. Only such doctrines of the other Jurists received that sanction, as were integrally contained and embodied in the works of these five. When these Jurists were not unanimous, the majority formed the rule; when they were equally divided, the opinion of Papinian was held as decisive; and, in the event of his silence, the case was left to the determination of the Judge. It is very remarkable, that in subsequent works, with the single exception of the Pandects, these five Jurists only have been consulted. This is the case in the Breviarium, the Papian, the Collatio, and the Consultatio.

And by the Gregorian, Hermogenian, and Theodosian Codes.

Regarding the Constitutions, a similar, but minor difficulty, occurred. On account of their great number, and their isolated and casual origin, it was not easy to possess and remember the whole. A collection of them was a matter of urgent necessity, and this could easily be made under public authority. The first proper collections—those of the Gregorian and Hermogenian Codes—included only the Rescripts. Another, of much more importance, was the Code of Theodosius II., A. D. 438, containing a collection of Edicts, since the time of Constantine; and, although prepared in Constantinople, considered as ob-

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ligatory in both divisions of the Empire. Still, however, new Edicts of the Emperor were pronounced, after the formation of this Code; and these subsequent Novellæ gradually became so numerous, that a collection of them also was indispensable.

When the Western Empire ceased, in A. D. 476, the following Law-Sources were known in practice.

1. The works of the Jurists, according to the rule contained in the Constitution of Valentinian III.
2. The Gregorian and Hermogenian Collection of Rescripts.
3. The Code of Theodosius II.
4. The separate Novellæ, which formed, as it were, a supplement to this last Code.

This statement shows the inaccuracy of the assertion of some modern authors, *e. g.* of Montesquieu. He maintains, that at this time the Theodosian Code was the only proper Law-Source (5). The works of the Jurists were, on the contrary, the foundation of the whole, and all the rest were merely separate, unconnected, and, by themselves, unintelligible Supplements; and a Judge would indeed have been ill provided for administering the Law, who took the Theodosian Code as his only guide.

(5) Montesquieu, Esprit des Lois, xxviii. 4.

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Farther changes in the Roman Law.

But, even this condition of the Sources could not continue. Notwithstanding their limited number, they were still beyond the impaired mental powers of the age. The facilities afforded for the study of the works of the Jurists, by the Constitution of Valentinian III., had become quite insufficient. The necessity of a second Reform was urgent and general; and, soon after the dissolution of the Western Empire, four different attempts to supply this defect were made within thirty years;—each, in a different kingdom, and independent of the others.

1. The Edict of the East-Goth, Theodoric. (A. D. 500).
2. The West-Gothic Breviarium of Alaric II. (A. D. 506).
3. The Papian, among the Burgundians. (soon after A. D. 500).
4. The Laws promulgated by Justinian, at first only for the Eastern Empire. (A. D. 528–534).

The first three of these belong immediately to our subject, and shall be examined in their proper places. But a short comparison of the whole with each other, and with the earlier condition of the Law, may be most properly undertaken at present.

Character of these changes.

The Edict, the Papian, and the Breviarium are perfect, as abridgements of a subject become unweildy from its extent; but their

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poverty is incredible, when viewed in connexion with the richness of the material, from which they were formed. In them all, the whole Roman Law, Jurists and Constitutions, are collected into a single book of small magnitude.

Of the Edict of Theodoric.

The edict of Theodoric is distinguished by this peculiarity. In it, all the sources are modelled into a new system: the old Jurists and Emperors no longer speak, but the author of the Edict alone. Thus, the sources have been changed, so as to be scarcely recognisable; and sometimes even the faintest traces of the Roman Law can, with difficulty, be discovered. It is the rudest and worst of all the collections, and for our purpose, therefore, the least valuable.

Of the Papian.

The Papian is almost equally uninstructive. It also forms a separate and complete work, and is arranged in the order of the subjects. In particular parts however, the sources are given pure and unchanged; and in this respect, it is much preferable to the East Gothic Edict.

Of the Breviarium of Alaric II.

The Breviarium is more copious than either. This is not an original work, arranged according to the author's own ideas, but a selection of passages from the Sources,—partly from the Jurists, and partly from the Constitutions. The excerpts are contained in one book, and are, for the most part, unchanged; but, the omissions are numerous. Most of

the passages are provided with a separate interpretation; and thus, both in originality of plan and execution, the Breviarium differs much from the two works just mentioned.

Of the Laws of Justinian.

It is impossible to compare the Laws of Justinian with these compilations, without being filled with astonishment; although, even without such a comparison, we could not refuse to them our admiration and gratitude. Original genius was indeed denied to this age, and the Law-Sources to be consulted by Justinian's compilators, belonged to a foreign and cultivated people, and were not to be found in the original literature of the Eastern Empire. Under these adverse circumstances, the compilations were begun, and the selections made with so much decernment and regard for the subject, that, notwithstanding our great want of historical information, the spirit of the Roman Law has been made comprehensible to us, after the lapse of 1300 years, by these books as almost our only guides, and its influence insured in every country, in which the people were unprejudiced, and possessed minds open to instruction. He who still maintains, that accident alone guided the compilators in their selection, and that they were devoid both of system and of knowledge of the subject, may convince himself of the contrary, by a comparison with the above mentioned laws of the

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Gothic and Burgundian kingdoms. To reply, that the compilators of these were barbarians, and that Justinian's assistants were Romans, is to state what is historically erroneous; for the authors of the former in the West were not Goths or Burgundians, but Romans settled in Rome and in Gaul. The merit which is here claimed for the Justinian Law may be called literary; but still, the object in making the compilation was not literary, but practical; although no doubt, Justinian's own Constitutions had a more intimate connexion with practice. These must indeed be admitted to possess different degrees of merit. A great part of them are unquestionably distinguished by the fullest comprehension of the subject, and by the most perfect adaptation of means to ends. Many of the ordinances also, which appear to us to be mere disfiguration of the old law, are only the judicious promulgation of changes, already spontaneously introduced and valid without any legislative interference. Regarding these also, a comparison may be made much to the honour of Justinian. If the Edicts in the Theodosian Code, or the Novellæ at the end of it, be contrasted with the Constitutions of Justinian, particularly with those in the Code, the latter, both in subject and form, will be almost universally acknowledged to be the most valuable, and the most easily understood.

Justinian's plan in the Pandects, Code, Institutes and Novellæ.

Justinian's plan embraced the two principal objects of abridging, in separate works, the Jurists, and the Constitutions. The first, or the Pandects, was very properly intended to contain the fundamental principles of the law; and it was the only work, since the Twelve Tables, which, in itself complete, and without reference to another, might be considered as a centre point, from which the whole law emanated. In this respect, it may be called a Code of Laws, and the first full comprehensive Code since the Twelve Tables: although, a great part of its contents is not properly legislative, but dogmatic and illustrative of particular cases. In place of the inadequate rules of Valentinian III., numerous excerpts from the writings of the Jurists are quoted at length, and classed in the order of the subjects. The plan of Justinian's Code, which included both Rescripts and Edicts, was more comprehensive than any which had preceded it. These two works completely fulfilled the purpose of Justinian. The Institutes cannot be considered as a third, and as independent of the other two, but rather as an introduction, and preparatory work to them. Finally, the Novellæ are separate and posterior additions and changes; and it is quite accidental, that a third edition of the Code, containing the Novellæ still in use, had not been prepared towards the end of the reign of Justinian.

CHAPTER II.

STRUCTURE AND CHARACTER OF THE ROMAN JUDICIAL SYSTEM IN THE FIFTH CENTURY.

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The Roman Empire consisted of—Italy and the Provinces.

In the latter times of the Republic, if we disregard the city of Rome, which was the centre of the whole, the Roman territory consisted of two differently organized parts—*Italy* and the *Provinces*. This distinction, although under great modifications, was preserved during the Imperial Government; and it is therefore necessary, that we should commence our inquiries, by investigating its character.

The citizens, Council, and Magistracy of the Italian Cities.

1. *Italy* consisted of a great number of republics, whose citizens, after the Italian war, were admitted to participate in the privileges of the sovereign people. The communities composed of these citizens were however subject to the Romans; but they were allowed to retain the power of managing their own internal affairs. This free civic constitution forms the fundamental character of Italy. The remarks, which we shall

here make regarding its organization, apply to both of the two principal classes of these chartered cities,—the Municipia and the Coloniæ. The peculiarities of the Præfecturæ, shall be afterwards noticed. The Fora, Conciliabula, and Castella, were smaller and more imperfectly organized Italian communities. (1) Two important divisions of this subject,—the citizens and councils of these republics—and their Magistrates—must be here clearly explained, in so far as they are connected with the administration of Justice. (2.)

The citizens possessed the sovereign power.

The assemblies of the people, in these cities, beyond a doubt, possessed the sovereign power, as in Rome. The citizens not only chose the magistrates, (3) but, in their assem-

(1) Villages, (Vici) which had no corporate organization, were included within the territory of the chartered city. L. 30. D. ad munic. (50. i.)

(2) For information regarding the constitution of the cities in general, the reader may consult—J. Gothofred, paratit. ad C. Th. xii. 1.—Roth de re municipali Romanorum. Stutgart, 1801. 8vo. The principal authorities are,—for the early times:—The Tabula Heracliensis (Ed. Mazochi. Neap. 1754. fol. p. 289—497, and in Hugo's Civ. Mag. B. 3. No. 19), and the Lex Galliæ Cisalpinæ, (also in Hugo, l. c. B. 2. No. 20. and in Obss. ad selecta L. Galliæ Cisalp. cap. auct. Dirksen, Berol. 1812 4.):—for the later times,—The Theodosian Code.

(3) Cicero, pro Cluent. 8. "Quatuorviros, quos municipes fecerant, sustulit." Tabula Heracleensis lin. 84. (aeris Neap. lin. 10.) "suffragio eorum qui cujusque municipii ....

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blies, made laws, (4) in the proper sense of that expression, and transacted other public business. (5) But, as in other cases, the popular influence (6) in these cities also fell a victim to the subsequent encroachments of the Council. Even in Rome, in the time of Tiberius, the elections were made in the Senate; and all the matters, formerly managed by the people, were gradually transferred to that body. This change, by the natural progress of imitation, must have been adopted in the Italian cities.

But this was afterwards acquired by the Council.

The Council of these cities, which was at first merely a branch of the executive, acquired the whole power after this period, and

erunt." lin. 98. 99. (24. 25.) "quicunque in municipio.... comitia duumviro ... rogando subrogandove habebit." lin. 132. (58.) "neve quis ejus rationem comitiis conciliove (habeto)."

(4) The Lex Tabellaria of M. Gratidius in Arpinum, which was opposed by Cicero's grandfather. Cicero de Legibus, iii. 16.

(5) Thus, in Pisa, in the time of Augustus, "universi decuriones colonique ... inter sese consenserunt"; and, afterwards, "hoc quod decurionibus et universis colonis placuit." H. Noris. cenotaph. Pisana tab. 2. and diss. 1. C. 3. p. 70. of the 3d volume of the Verona Edit. of his works in 1729, where also other examples are given. Compare Gruter Inscr. p. 363. p. 431. num. 1. p. 475. n. 3.

(6) This will be more distinctly shown afterwards, when speaking of the Defensors. Other remains of these free communities and their rights, may be found in Roth, l. c. p. 62. § vi.

deserves our most serious attention; since, it is that branch of the Roman Constitution, which may be proved to have existed longest, during the middle ages.

The Council was styled—Ordo Decurionum—Ordo—Curia.

The common appellation of these Councils was Ordo Decurionum; afterwards, simply Ordo; and, in still later times, Curia. Their members were styled Decuriones or Curiales, (7) Curia and Senatus are not unfrequently opposed to each other; in applying the former to denote a subordinate city, and in expressing, by the latter, without any additional term, the city of Rome, or the Imperial Senate. (8) The terms, Senatus and Senator, are used, however, when speaking of the subject-cities, not merely by historians, and in common inscriptions (9), where it might be attributed to a careless mode of expression, or to civic vanity, but in the Tabula Hera-

(7) Decurio and Curialis are synonimous, as is plain, from Isidor. etymol. IX. 4, and from the indifferent use of both in the Theodosian Code, e. g. in L. 6. C. Th. de decur. (12. 1.) This scarcely deserved to be mentioned, if French authors had not founded systems, upon the assumption of the two words being different. Curialis is the latest term. Roth. l. c. p. 66. not. 27.

(8) e. g. L. 74. C. Th. de decur. (12. 1.) "In his, qui ex curiis ad senatus consortia pervenerunt:" and, L. 85. eod. "decurionem, et suae, si sic dici oportet, curiae senatorem."

(9) Such passages are quoted in abundance by Otto de Ædil. Colon. C. 2. §. 4.

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cleensis (10), a Roman Plebiscitum. Some other terms, such as Municipes, Principales, shall be afterwards explained.

And elected the Magistrates.

The proper occupation of these Curiæ was the management of the internal affairs of the cities, along with the magistrates. These two powers did not, however, act as checks upon each other, but were, on the contrary, connected by a double tye. For, the Decurion alone, was eligible to the Magistracy (11); and, the election itself was made by the Decurions. This last circumstance, as it has been frequently misunderstood, seems to require a more particular explanation. Candidates were put in nomination for the Magistracy (Nominatio), and then the proper election took place in the Curia (Creatio). In the greatest number of the laws, the nomination only is mentioned (12); and most modern authors have, from this cir-

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(10) Tabula Heracl. lin. 85. 86. (aeris Neap. lin. 11. 12.) "ne quis . . . in eo municipio, colonia, praefectura, foro, conciliabulo senatum, decuriones, conscriptosve legito:" afterwards, lin. 87. 88. (13. 14.) "se senatorem, decurionem, conscriptumve ibi hac lege esse non licere:" and, in many other passages of the same inscription.

(11) L. 7. §. 2. D. de decur. (Paulus) (50. 2.) "Is qui non sit decurio, duumvirato, vel aliis honoribus fungi non potest: quia decurionum honoribus plebeji fungi prohibentur."

(12) e. g. L. 11. §. 1. L. 13. L. 15. §. 1. D. ad municip. (50. 1.)—L. 1. C. de peric. nominatorum (11. 33.),—L. 2

cumstance, altogether overlooked the election. (13) The Curia's right of election, however, is acknowledged in other passages of the Law-Sources; and even the distinction between the nomination and the election, is fully expressed. (14) The retiring Magistrate had the right of presenting his successor; but, this privilege was rather a burden than an advantage; since, it made him responsible for the conduct of his presentee. (15) On this account, the magistrate going out of office, was generally well pleased, when, as frequently happened, the Roman Governor of the province interfered and presented some favoured Decurion. (16) A particular custom is expressly mentioned,

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eod.—L. 3. C. quo quisque ordine (11. 35.) In the two last Laws, creare is used instead of the proper term nominare; and the converse happens in other passages. An accurate employment of the technical language is not to be found on this subject.

(13) e. g. J. Gothofred. ad L. 1. C. Th. quemadm. munera (12. 5.).—Roth, l. c. p. 76. §. 12., has noticed, and completely refuted this mistake.

(14) L. 1. §. 3. 4. D. quando appellandum (Ulpian.). (49. 4.) "Solent plerumque praesides remittere ad ordinem nominatum, ut Gajum Sejum creent magistratum: ..... magis enim consilium dedisse praeses videtur, quis sit creandus, quam ipse constituisse: .... Sed et si praeses in ordine fuerit, ut fieri adsolet, cum ab ordine crearetur quis," rel.—L. 45. C. de decur. (10. 31)—L. 8. C. de suscept. (10. 70).

(15) See the references in note 12.

(16) See Note 14.

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as existing in the African cities; which, although not distinctly described, was perhaps nearly as follows. The retiring Magistrate presented the candidate; but the election was not completed, as in other cities, by the Decurions alone, but by the whole people, i. e. by all the corporations,—the Curia, and the guilds. Each of these bodies voted apart, and the presence of at least two thirds of their members was necessary. (17)

The Councillors—Decurions,—could alone be chosen Magistrates.

During the free Republic, there were two kinds of Roman citizens:—those who participated in the sovereign power, and those without that privilege (optimo jure, non optimo jure cives). The prerogatives of the higher class were the right of voting in a Tribus, and the capacity of becoming magistrates (suffragium et honores). Now, if this distinc-

(17) L. 1. C. Th. quemadm. munera (12. 5.)—L. 84. 142. C. Th. de decur. (12. 1.). The term 'nominatio' is used indefinitely in all these passages. In the second, the commencement, 'In nominationibus a singulis quibusque ordinibus celebrandis,' must be understood to apply to all the corporations or orders of each city, and not to the Curia alone. This signification of ordinis is well known, e. g. 'per consensum omnium ordinum.' Cic. ad Brutum, ep. 3. and Cenotaph. Pisan. Tab. 2. —— Noris, cenotaph. Pisan. diss. 1. C. 3. p. 72. supposes, without sufficient reason, that although, according to the first passage, the people had the right of electing, yet in the Laws. 84. and 142. it seems to have been ceded to the Decurions alone.

tion, and these expressions, be applied to the constitution of the Italian cities, it will be found, that, generally, the Decurions alone possessed the full right of citizenship—cives optimo jure—and, that the other citizens (Plebeji) had become—cives non optimo jure. Augustus commenced this last alteration, by allowing the chartered cities to send in written votes to the elections at Rome, and by conferring this privilege, not equally on all the citizens, but exclusively on the Decurions. (18) This distinction indeed ceased under Tiberius, when all the Roman elections were taken from the incorporated citizens, and conferred upon the Senate; still it was the cause, why the Decurions were favoured above the rest of the people. After this innovation, the term Municipes, which originally denoted all the citizens, very often signified the Decurions alone. (19) The application of this remark will be more apparent, when describing the subsequent condition of the cities.

(18) Sueton. August. C. 46. According to the reading of the manuscripts, and not according to the arbitrary and superfluous emendations. The passage is completely misunderstood by Noris, Cenotaph. Pisan. diss. 1. C. 3. p. 52. as referring to the elections of the Duumvirs, although it plainly relates to those of the magistratus populi Romani.

(19) J. Gothofred. parat ad C. Th. XII. 1.—Roth l. c. p. 139. not. 365.—Marini papiri diplomat. p. 338.

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But, their office became highly burdensome.

The civic constitution, and the order of the Decurions, were originally framed for the purpose of promoting the dignity and respectability of the Italian cities. All doubts on this subject may be removed, by examining the last eight sections of the Tabula Heracleensis. But, when despotism had annihilated public spirit, the condition of the Decurions became highly burdensome; and nothing proves more distinctly the total overturn of internal government, under the Christian Emperors, than the multitude of constitutions, concerning the Decurions, in the Theodosian Code. The plebeians shunned admission into that order; and, the Decurions strove, in every manner, to escape the honours belonging to their rank. Many joined the army, or became bondmen in the country, in order to conceal themselves; but they were followed to their retreats, and forced back to the Curia. (20) It had been the practice to condemn criminals to the Curia, and they were only prohibited from becoming Decurions, by the ordinances of the Emperors. (21) Jews and Heretics were, like the rest, under the necessity of becoming

(20) Cod. Th. lib. 12. tit. 19.—L. 10. 11. 13. 22. C. Th. de decur. (12. 1.), and many others, treat of their military service.

(21) L. 66. 108. C. Th. de decur (12. 1.) But, other laws inflict the same punishment, e. g. on worthless clergy-

Decurions;—and Justinian first imposed on them the burdens of the office, without granting them any of its honours. (22) The spontaneous act of joining the Curia was encouraged by various privileges; and, among others, by legitimizing the person born out of wedlock, who voluntarily became a member of that body. This melancholy condition of the cities by no means arose from the theory of the constitution. Unquestionably, many inconveniences, in their condition, might be traced to that source. Their Magistrates and Decurions were employed to levy the Imperial taxes, and they were accountable for their malversations and negligence in this employment, as well as in their ordinary functions of administering the city-affairs. (23) These responsibilities, however, were necessarily implied in their office, and could not be considered as hardships. But, to require each magistrate to be security for his colleagues, and for his successor, whom he had put in nomination, must be viewed as grievous oppression. (24) It was equally unjust to compel the Decurions to occupy the

men, and on soldiers, who, from cowardice, had deserted the service. Roth. l. c. p. 42. 46. 52. 53.

(22) L. 99. 165. 157. C. Th. de. decur. (12. 1.)—Nov. 45.

(23) Roth. l. c. p. 139. sq., treats fully of this responsibility.

(24) See note 12. Compare—tit. Cod. quo quisque ordine.

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estates, which, on account of the exorbitant taxation, had been deserted by the proprietors, and to pay the public imposts exigible from them; although, this burden was afterwards borne, in common, by all the citizens, who possessed landed property. (25) Still, the principal cause of these monstrous acts lay, not in the constitution as contained in the laws, but in the arbitrary and tyrannical executive: for no remnant of the free Republic had been preserved so entire, as the iniquitous conduct and oppression of the governors. Traces of some of their practices have come down to our times. It was their custom to compel the Decurions to pay, out of their own private fortunes, and without regard to the circumstance of the debt not being their own, any deficiency occurring in the produce of the taxes: an insupportable hardship, and condemned, as a wanton abuse of power, by numerous laws. (26) If, however, such injustice possessed a semblance of regularity and order, how shameless must have been the notoriously il-

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(11. 35).—L. 2. 8. C. de susceptor. (10. 70.) i. e. L. 8. 20. C. Th. eod. (12. 6.)

(25) L. 1. C. de omni agro deserto (11. 58.).

(26) L. 186. C. Th. de decur. (12. 1.).—L. 17. C. J. de omni agro deserto (11. 58.)—Nov. Majoriani, Tit. 1.—Roth. l. c. p. 79. 71.

legal acts of pure arbitrary power! That the leading men and representatives of the communities principally suffered from these oppressions, and that a mean and humble condition of life afforded the only securities against them, may be inferred from such a total subversion of all the social relations.

And ceased, ultimately, to be a place of honourable ambition.

The appointment of the Decurions, as has been cursorily remarked, stood nearly in the same condition with that of the Magistrates. Originally, a seat in the Curia was an object of honourable ambition: but, afterwards, the question was by what means it could be avoided. At first, when that dignity was hereditary, mere birth created an obligation to serve in the Curia; and afterwards, the vacancies were filled by the free choice of its existing members, (27) which every citizen was bound to obey. Those Decurions only were exempted from service who had filled, successively, all the public offices of the city, or had held high situations at Court, or had been employed in the service of the state; but, no exemption was granted, if any of these honours had been surreptitiously obtained, merely for the purpose of acquiring this immunity. (28)

(27) L. 6. § 5. D. de decur. (50. 2.)—L. 66. C. Th. eod. (12. 1.) Consult, principally, J. Gothofred. parat. ad C. Th. XII. I. and Roth. l. c. p. 68. 76.

(28) It is incredible, how often these exemptions have

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According to the prevailing opinion, the Principales were a small committee of Decurions; but, our remarks on this subject, and on the rank of the Decurions, will be better understood, when examining the condition of the Provincial cities.

The Internal Affairs of the Cities were managed by the Magistrates.

The direct management of the city affairs was intrusted to the magistrates. They were not equally numerous in all the cities, nor designated by the same names. Those only shall be noticed, at present, who were connected with the administration of Justice, or survived the dissolution of the Western Empire. Such were—the Duumviri, Præfecti, Quinquennales, Defensores, and the officers of the Chancery, or the persons employed with the Records and books of Court, and with the preparation and copying of deeds. Besides the proper jurisdiction (Jurisdictio contentiosa), they possessed also the voluntaria. Their criminal powers are but slightly connected with our subject. These have, least of all, contributed to preserve the remembrance of the Roman Law, and were, at an early period, taken from the Civic authorities. For, besides the jurisdiction of the magis-

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been changed by the Constitutions. The leading authority, regarding the early law on this subject, is L. 5. C. Th. de decur. (12. 1.); and, regarding the later, L. 66. C. J. eod. (10. 31.) The principal author, is J. Gothofred. ad L. 5. cit. and paratit. C. Th. XII. 1.

trates, the supreme Court of the Imperial Governor existed in Italy from the second century.

The Supreme Magistrate was styled Duumvir—Quatuorvir—Magistratus—Consul—Dictator—Prætor.

The highest ordinary magistracy of the Italian cities, may be compared with the Roman Consulship, previously to the transference of the judicial functions to the Prætor. Thus, it conferred—the highest superintendance over every branch of the administration—the presidency in the Curia —and the administration of justice. The proper name for these magistrates was Duumvir or Quatuorvir, according as two or four individuals filled the office. (29) The former was the case in most of the cities. (30) In inscriptions, the administration of justice is frequently mentioned as the principal employment of these magistrates: thus, Duumvir J. D. (juri dicundo), Quatuorvir J. D.

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(29) These, along with Præfectus, occur, as the exclusive titles of the Supreme Magistrates, in the Tabula Heracleensis, and in the Lex Galliæ Cisalpinæ. Of the Præfects we shall afterwards speak. That the Duumvirs or Quatuorvirs were the highest among the ordinary magistrates, is plainly proved by L. 77. C. Th. de decur. (12. 1.) In the same city, there were sometimes Duumvirs, and sometimes Quatuorvirs; for, the vanity of the citizens often occasioned the multiplication of offices. Noris. Cenotaph. Pisan. diss. 1. C. 3. p. 50.

(30) Cicero in Rullum. II. 34. "cum ceteris in coloniis duumviri appellentur."

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(31) Such titles, however, express merely the number who held the office; and, are so far from denoting any of the peculiar characteristics of these supreme magistrates, that they are applied to many others. (32) For this reason, Magistratus, originally the most common of all the appellatives, acquired a special signification, and denoted the supreme magistrate of the city, without distinguishing between Duumvir and Quatuorvir. Magistratus is generally employed in the Pandects; but, there, and in the Constitutions, that term and Duumvir are used synonimously. (33) In Marini's deeds, where

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(31) e. g. in Doni class. 5. N. 42. 83. 84. 228. Marini, fratelli arvali, p. 780. maintains, that the highest Quatuorvir was different from the Quatuorvir, J. D.; but, this opinion is certainly erroneous; because, jurisdiction was always the attribute of the Supreme Magistrate. This is particularly plain, when the word Magistratus is used; for, that term denoted, unquestionably, the highest magistrates. Indeed, the Magistratus are expressly said to possess jurisdiction.

(32) In the cities, Duumviri and Quatuorviri quinquennales (see below), quatuorviri aediles occur. Doni Inscrip. Class. 5. N. 83. In Rome, duoviri viis extra urbem Romam, quatuorviri viis in urbe purgandis.—Tab. Heracl. lin. 50.—Conradi parerg. p. 395.

(33) L. 4. §. 3. 4. D. de damno infecto. (39. 2.)—L. 16. C. Th. de decur. (12. 1.) i. e. L. 18. C. J. eod. (10. 31.)—L. 1. C. Th. quemadm. mun. (12. 5.)

consequently the notice is applied to the individual functionary of a particular city, the title Magistratus is uniformly used. (34) Sometimes, the supreme magistrate was called Consul, and this is found most frequently in inscriptions. It is difficult to say, whether this arose from vanity, or was the remnant of an original independence. The titles Dictator and Prætor continued likewise in many cities, even under the Emperors (35). When speaking of the Decurions, notice has been taken of the mode of electing the Duumvirs; and it only remains to add, that they continued in office during one year. (36)

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(34) e. g. N. 115. "Defensori, Magistratibus, Quinquennalibus, cunctoque ordini curiae civitatis Faventinae," In the same manner, in other places, it is always "Magistratus dixerunt," never "Duumviri:" although, the Magistratus were plainly duumviri: e. g. in N. 74.

(35) Consult—Gruter Inscript. Index p. XV.—Otto diss. de consulibus qui extra Romam. C. I.—Otto. de aedil colon. C. 2. § 5. 6. 7. and—Noris cenotaph. Pisan. diss. 1. C. 3. p. 68—69. Duumvir, with some exceptions, may have become the general title by the Lex Julia.

(36) L. 13. D. ad munic (50. 1.).—L. 16. C. Th. de decur. (12. 1.) i. e. L. 18. C. J. eod. (10. 31.)—L. 1. C. Th. quemadm. mun. (12. 5.) Under Augustus, this does not appear to have been a general rule. Noris cenotaph. Pisan. diss. 1. C. 3. p. 54. For the later times, see J. Gothofred. ad L. 16. C. Th. cit.

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His jurisdiction, at first ample, was restricted under the Emperors.

The jurisdiction of the Duumvirs is, for our object, the most important consideration. The fact of their having possessed jurisdiction is already proved, by the above mentioned appellation—Duumvir juri dicundo: but its precise limits are not easily ascertained. A modern author has maintained, that during the free Republic, this jurisdiction scarcely existed, and that it first became important under the Emperors. (37) The very reverse, however, may be stated to be the fact; for, in the time of the Republic, it seems to have been quite unlimited, and to have been only afterwards subjected to those restraints, which we find, from our Law-Sources, were imposed upon it.

These restrictions, and their origin, are proved from the Roman History.

The strongest of all the proofs in favour of this opinion, is derived from the Roman History. In the infancy of Rome, when she had succeeded in making some of the Italian cities dependent, by communicating to their citizens the rights

(37) Rothf. l. c. p. 23. 24. 91. "jurisdictio exigua et paene nulla." His authorities are from Juvenal and Persius, who speak contemptuously of this jurisdiction. But, first, these passages refer to the Police Ædiles, and not to the Duumvirs; and, secondly, these poets might, properly enough, consider the business in the Italian cities as trifling, when compared with that in Rome.

of her own, the former were raised to a sort of equality with the latter, and, to this circumstance may be attributed their free constitution. But, when the Empire included portions of three quarters of the globe, this kind of equality entirely disappeared, and thus, in subsequent times, the freedom of the cities was much diminished. By the necessary influence of the Imperial government likewise, the great distinction between the two parts of the Empire—Italy and the Provinces—gradually disappeared, in the common degradation of all. Italy, which was formerly the most favoured part, lost its independent distinctions, and the provinces, for a while, rose in proportion, until the whole sunk, at last, into incurable debasement. It is certain, that the ancient powers of even the authorities of Rome were impaired. The Prætors, from being the highest functionaries in their department, were soon obliged to admit appeals to the Emperor; and, having been afterwards placed under the control of the Imperial officers, their authority ultimately sunk into comparative insignificance. How much more naturally may it be presumed, that the powers of the Duumvirs underwent, about the same time, a similar decline, than that they were further extended, and confirmed? Besides, it is a fact, that the invariable mode of ruling the

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provinces, by governors, was now transferred to Italy. The Curia of the Theodosian Code, obviously, no longer equals, in authority and influence, that of the Tabula Heracleensis; and, it is indeed a bold assumption to suppose, that the preponderance and power of the Duumvirs increased, while the Curia, of which they were a part, sunk into imbecility and contempt. Such a condition of the Duumvirate jurisdiction involves an impossibility. Since the Italian or social war, the Italians, south of the Rubicon and the Arnus, enjoyed the rights of Roman citizens. Now, if the Duumvirs had no jurisdiction, it must have been possessed by the Prætor Urbanus. If so, then one functionary had the direct charge of the whole law-business of Rome, and of Italy. But, this assumption being altogether impossible, perhaps it may be said, that, either governors for whole districts of Italy, or magistrates for particular cities, were sent from Rome. The former of these was, however, introduced by Hadrian, and the latter occurred only, as an exception, in the small Præfectures. Consequently, the Duumvirs alone remain for the common and ordinary administration of justice, in the preceding times.

Originally, therefore, the jurisdiction of the Duumvirs was quite unlimited; and,

how the limitations arose may be shown, with some degree of probability. When the Provincial administration was dissolved in Cisalpine-Gaul, the modern Lombardy, and the country attached to Italy, a sudden introduction of the whole Italian system might be considered dangerous. As a preventive against these dreaded evils, jurisdiction to a definite amount, was conferred on the cities; and, higher matters only were remitted to the Prætor at Rome. Hadrian divided the whole of Italy, with the exception of one district, placed directly under the Prætor Urbanus, (38) into four Consulships, in the manner of the Provinces. Marcus Aurelius introduced Juridici, in the place of the Consulares; (39) and these, although of inferior rank, possessed the same magisterial powers. The Constitutions of the cities were not however dissolved, but subjected partly to the Prætor, and partly to these Governors. From this period, the limitation of the jurisdiction to a definite sum, with the addition of new restrictions, was extended from Lombardy over Old Italy. This account of the origin

(38) See below note 53. The authorities, there given, prove the subordination of many city magistrates to the Prætor.

(39) Spartian. Hadr. C. 22,—and Capitolin. Antonin. Pius., C. 2.—Marcus C. 11.—Dodwell praelect. Camden. Prael. 9. §. 8. sq.

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of these limitations, in itself highly probable, is confirmed by the circumstance, of such a Juridicus being mentioned, with the addition —de infinito. (40) The office of these governors in Italy underwent many changes, until they became quite similar to those of the rest of the empire, as we find implied in the Theodosian Code. The true state of the Duumvirate Jurisdiction seems, therefore, to have been: that, in ordinary cases, it formed the court of first instance, and from it, an appeal might be made to the officers named by the Emperor. (41) The first instance likewise belonged to the Imperial officer, not only in the exempted cases; e. g. in those between cities, or civic functionaries; but also in the cases, relating to more than the prescribed sum. It may be doubted, whether the limitation to a certain sum was of permanent continuance: since, neither in the Theodosian, nor Justinian compilations, is the restriction, or its amount ever made the subject of any direct ordinance. For reasons, however, to be afterwards given, these omissions are perhaps no evidence of the recall of the restrictions.

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(40) Gruter. Inscr. p. 1090. N. 13. "M. Aelio Aurelio Theoni. Aug. Juridico de infinito per Flam. et Umbriam. Picenum. Sodali Hadrianali" rel.

(41) L. 1. 3. C. Th. de reparat. appell. (11. 31).

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And, from a comparison of the Lex Gall. Cisalp.

It still remains to notice the circumstantial proofs illustrative of the character of the Duumvirate jurisdiction, and, these will be found to confirm the view derived from history. The commencement of the Imperial government may be taken, as the first point of observation. The Lex Galliæ Cisalpinæ, which organized the judicial establishment of that new part of Italy, probably belongs to this period. The remains of that Plebiscitum afford the following facts, regarding Lombardy. (42) The magistrate might appoint a Judex, and arrange the procedure, in the form of a Judicium. (C. 20.) In some cases, his jurisdiction was unlimited; (43) in others, and to this class loans of the current Roman money belong, he was only competent, when the disputed sum did not exceed 15,000 sesterces, or 100 guineas. (C. 21. 22.) He might remit an operis novi nuntiatio, (C. 19.) and impose, by his decree, the cautio damni infecti. If the security were not found, he might proceed to grant relief, by the missio in rem, and the actio in factum, for compensation of the damages.

(42) I quote, according to the chapters, which are marked on the margin of the inscription itself.

(43) C. 22. in Dirksen, l. c. p. 12. "si ea res erit, de qua re omni pecuni ibi jus dici, judiciave dari ex hac lege debebit oportebit." The recency of the whole distinction, and its local application, are plain, from this passage.

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(C. 20) In like manner, he might pronounce the usual judgment, in a judicium familæ herciscundæ. (C. 23) Concerning execution, the following are the ordinances. When, in cases of loans of current Roman money, resembling our bill-debts, under 15,000 sesterces, the defendant admits the debt before the Civic magistrate,—confessio in jure,—but becomes afterwards contumacious, the magistrate, in the same manner as if judgment had been pronounced, and consequently in that case also, might adjudge—duci jubere—the person of the debtor to the plaintiff, until payment of the debt. (C. 21) But, if a confession, or contumacy occurs, in any other suit, of which the magistrate might take cognizance, the Prætor in Rome only was competent to grant execution; and, this might consist in adjudging both the person,—duci jubere,—and the estate —bona possideri, proscribi, venire. (C. 22) On some occasions, Imperium is attributed to the civic magistrates; (44) and this accords, both with a passage in Apulejus, (45) and with the circumstance, that, in earlier times, the magistrates, undoubtedly, used the Sella Curulis on the Tribunal, in token of their supreme power.

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(44) Col. 1. lin. 50. 51. "neve quis magistratus... pro quo imperio potestateve erit."

(45) Apuleji metamorph. Lib. 1. C. 18. p. 77. ed. Ruhnk. "Quem confestim pro aedilitatis imperio acerrime increpans," rel.

(46) Their criminal jurisdiction was already, and at a very early period, subjected to limitations. (47)

With the Pandects and Paulus.

In the Pandects, and in Paulus, authorities from the times of the classic Jurists, the following information is contained. Jurisdiction was certainly an attribute of all the magistrates; and, they had the right, consequently, of appointing a Judex, who proceeded with the case, under their written instructions. (48) Their jurisdiction was limited, however, to a sum, which is not specified; but, in such a manner, that the parties might renounce that objection to their competency. (49) They are called Magistratus Minores, and have neither Imperium, nor Potestas, nor the rights flowing from Imperium. (50) On this account, they could not in integrum restituere, nor grant a missio in possessionem bo-

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(46) Sueton. de clar. rhetor. C. 6. "C. Albutius Silus, Novariensis, quum aedilitate in patria fungeretur, quum forte jus diceret, ab iis, contra quos pronunciabat, pedibus e tribunali detractus est." cf. Otto de aedil. colon. C. 12. §. 2.

(47) Noris, cenotaph. Pisan. diss. 1. C. 3. p. 51.

(48) L. 3. in f. L. 13. pr. §. 1. D. de jurisdict. (2. 1.)—L. 26. pr. L. 28. L. 29. D. ad munic. (50. 1.)—Paul. lib. 5. tit. 5. A. §. 1.

(49) L. 28. D. ad munic. (50. 1.)—Paul. lib. 5. tit. 5. A. §. 1.

(50) L. 26. pr. D. ad munic. (50. 1.)—L. 32. D. de injur. (47. 10.)—Paul. lib. 5. tit. 5. A. § 1.

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norum.(51) The imposing of Cautio, and the Missio in rem, in the case of Damnum infectum, as rights belonging to Imperium, were beyond their powers. (52) They only acted, in these matters, when great despatch was required, by a special commission from the superior magistrate; i. e. from the Prætor, Consul, &c., within whose district their city was included. With all the other proceedings, such as the Missio ex secundo decreto, and the Actio in factum, they could not interfere. (53) They might also be sued, during the period of their magistracy: (54) and, they did not possess the Pœnale judicium, against the contemner of their jurisdiction, which was granted to the superior magistrates. (55) Only the right of Mulcta remained with them, and the pignorum capio, which is merely another form of Mulcta. (56) They likewise possessed the right of appointing tutors; (57) but, not, of ascending the Tribunal. (58) Finally, their criminal juris-

(51) L. 26. §. 1. D. ad munic. (50. 1.)

(52) L. 4. D. de jurisdict. (2. 1.)

(53) L. 1. L. 4. §. 3. 4. D. de damno infecto (39. 2.)

(54) L. 32. D. de injur. (47. 10.)

(55) L. 1. pr. D. si quis jus dicenti (2. 3.)

(56) L. 131. §. 1. D. de V. S. (50. 16.)—L. 1. §. 1. 2. D. de via publ. (43. 10.)—Roth, l. c. p. 92.—L. 29. §. 7. D. ad L. Aquil. (9. 2.)—L. 3. §. 1. D. de rebus eorum. (27. 9.)

(57) L. 3. D. de tutoribus datis (26. 5.)

(58) Otto de aedil. colon. C. 12. §. 2.

diction was so low, that they could inflict on slaves only a moderate correction. (59) If these circumstances be compared with the earlier state of the Duumvirate jurisdiction, the restrictions appear to have become general, and, from being originally applicable to Lombardy alone, to have been extended over the whole of Italy. Indeed, the restraints had been multiplied, and greatly increased; since, the Duumvirs were now only Minores Magistratus, without the Imperium, and without the Tribunal. And this change did not consist merely in name and form, but reached the extent and rights of the jurisdiction itself; as is plain, from the few cases, in which it is possible to institute a direct comparison of the practical law of the Pandects, with that of the Lex Galliæ Cisalpinæ. Such an example, however, occurs in the Actio in Factum, in the case of damnum infectum; and, while the Magistrates may grant the action, by that law, their incompetency is announced, by the Pandects.

But, the Duumvirs always continued to form a Court of first instance.

The accounts of the Duumvirate jurisdiction, in later times, are very imperfect; but, they are still sufficient to prove its continuance, in the same subordinate capacity, as forming a court of first instance. (60)

(59) L. 12. D. de jurisdict. (2. 1.)—Roth, l. c. p. 95.

(60) L. 1. 3. C. Th. de repar. appell. (11. 31.) The Con-

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To some of the Italian Cities, Prefects were sent, annually, from Rome.

The Præfects were the second magistrates in the Italian cities. They never occur along with the Duumvirs; but, only as a substitute for these in particular cities, and constituting an exception to the general rule. Regularly, the administration of justice was in the hands of magistrates, elected by the cities themselves. In some, however, it was possessed by a Præfectus Juri dicundo, who was chosen annually, in Rome, and sent to the city. (61) This constituted the only difference, between these Præfectures, and the other cities. In every other respect, they were the same. A Præfecture had, consequently, its own Curia. (62) But, as the Præfects stood in the place

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stitutions are of the dates 364 and 368. According to a Constitution of Constantine, the judicial acknowledgment—agnitio—of the heir's desire to take up the vacant succession, and the bonorum possessio are said to be competent before the Duumvirs. L. 9. C. qui admitti (6. 9.) This was occasioned, however, not by an elevation of the office, but by a lowering of the judicial act, which, in that very constitution, is stript of all its old strictness and solemnities.

(61) Festus v. præfectura.—Livius XXVI. 16.—Cicero ad famil. XIII. 11.

(62) Tabula Heracleensis, lin. 85. 86. (aeris Neapol. lin. 11. 12. Mazochi, p. 401.) lin. 96. (22.) 105. 106. (31. 32.) 108. 109. (34. 35.) &c. In the same manner,—the decurio Fundanus, in Sueton. Calig. C. 23.; for, according to Festus, l. c. Fundi was a Præfecture—and the Præfectura Peltuinas, in Mazochi, p. 396, §. 3. not. 22. and in Gruter. Inscr. p. 443. 6.

of the Duumvirs, the rights of election could be exercised in filling only the other magisterial appointments. (63) The Præfecture cities were both Municipia and Coloniæ; and, we must presume, neither inaccuracy of expression, nor change of condition, when the same city is called sometimes a Præfectura, and sometimes a Municipium. (64) Finally, the personal privileges of their citizens were certainly not inferior to those of the other chartered cities; otherwise, Cicero, the citizen of Arpinum, could never have become a Roman Consul. (65) This condition of the Præfectures was not changed, by the Lex Julia de Civitate, U. C. 664; but, seems to have gradually disappeared, under the Emperors. (66) Modern authors have maintained,—that the Præfecture, like the Provincial

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(63) Tabula Heracleensis lin. 83. 84. 85. 130. (9. 10. 11. 56. Mazochi, p. 401. 446.) Cicero ad famil. xiii. 11. concerning Arpinum; which, both according to this passage, and to Festus, l. c. was a Præfecture. See also the inscription of the Præfectura Peltuinas in Mazochi, p. 396.

(64) e. g. Arpinum and Puteoli were both, according to Festus, l. c. Præfecturæ. Cicero ad famil. XIII. 11. and pro. M. Coelio. C. 2. The sixth line of the Lex Galliae Cisalp. is quite decisive, "duumvir, quatuorvir, praefectusve ejus municipii."

(65) Another case may be found in Cicero pro Plancio, C. 8.

(66) Festus l. c. mentions it, as an antiquated matter.

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cities, had no proper constitution,—that their citizens were the lowest, in the scale of all the inhabitants of Italy, and,—that their condition was first improved, by the Lex Julia. (67) The example of Capua, which, in fact, during a certain time, was deprived of all its privileges, (68) as a punishment, and which has been improperly considered, as a type of all the Præfecture cities; and, the too general expressions of Festus, (69) have been the occasions of this error.

The Censor of the chartered cities was styled Censor—Curator—Quinquinnalis.

Another civic magistrate is the Censor, Curator, or Quinquinnalis; titles, which are quite synonimous, and designative of the same office, although differently applied, in different times, and places. The term Censor occurs, in the Italian, (70) but, more frequent-

(67) Sigon. de jure Ital. II. 11. 12.—Otto de aedil. colon. C. 8. §. 7.—Mazochi, tab. Heracl. p. 392—397. 467.

(68) Livius XXVI. 16.—Cic. in Rullum, I. 6.

(69) Festus v. praefectura. "neque tamen magistratus suos habebant." Magistratus there stands for Duumviri,—Magistratus juri dicundo, in perfect conformity with the later phraseology.

(70) Gruter. Inscr. p. 366. N. 2. from Naples. See other passages in Olivieri's notes on the Marmora Pisaurensia, p. 68. and 72. There were also Censors in the Latin Coloniæ. Liv. XXIX. 15. It is remarkable, however, that in the Tabula Heracleensis, lin. 142. (aeris Neap. lin. 68. Mazochi. p. 454.), the Census is not committed to particular Censors, but to the Duumvirs, as the ordinary supreme magistracy; a rule applicable, perhaps, merely to that special case.

ly, in the Provincial inscriptions. Curator is the title most commonly used. The duties of this office corresponded with those of the Roman Censorship, and, sometimes, included the department of the Quæstor. (71) The Curator took the charge of the public buildings, and works,—leased out the landed property of the city, and—managed the city revenues. In the Constitutions, he is placed before the magistrates; i. e. the Duumvirs. (72) None could be elected Curator, who had not previously filled all the other offices; (73) and, certainly, this is a distinction, which, in conformity with the custom in Rome, indicates high rank. (74) According to one constitution, doubts might arise, concerning this preeminent dignity; for, a previous permission to record (75) donations, in the Court books of the Curator,—apud acta adlegare, publicare—was afterwards recalled; (76) and it is added " ne tanta res eorum concidat

(71) J. Gothofred. ad. L. 20. C. Th. de decur. (12. 1.) and Roth. I. c. p. 98—100.

(72) L. 5. C. Th. de exhib. reis (9. 2.)—L. 3. C. Th. de donat. (8. 12.)—L. fin. C. Th. de superexact. (11. 8.)—L. 5. C. Th. de reparat. appell. (11. 31.)

(73) L. 20. C. Th. de decur. (12. 1.)

(74) L. 11. pr. L. 14. §. 5. D. de muner. (50. 4.)—Roth l. c. p. 89.

(75) L. 3. C. Th. de donat. (8. 12.)

(76) L. 8. C. Th. de donat. (8. 12.)

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vilitate." These words have been construed to signify, that the Curators were too inferior for so important an act. But, for the reasons already given, that explanation is to be entirely rejected. Ideas of greatness and importance could never, in these circumstances, be attached to the recording of donations. Tanta res is, therefore, not to be referred to donations, but, to the proper business of the Curator; and vilitas alludes, not, to the inferiority of the office, but, to the greediness and avarice of many who filled it. The Curators were forbidden to undertake that business, in order, that they might not be tempted, from a desire to draw the fees, to search for such collateral employment, and to neglect the important duties of their office. None of these terms, however, have been so extensively misunderstood, as Quinquennales. (77) The civic magistrates, denoted by that title, were sometimes Duumviri, and sometimes Quatuorviri. (78) It has been maintained, that they are the same with the highest Duumvirs, who were called Quinquennales, in those cities, where the supreme magistrates con-

(77) The best author, on this subject, is Olivieri, on the Marmora Pisaurensia. Pisauri. 1738. f., notae, p. 67. sq.

(78) e. g. Doni Inscr. class. 5. N. 15. 16. 42. 84. 228. In deeds and inscriptions, they are frequently denoted, by a q. or. qq., or q. l., which has usually been considered, as meaning quaestor laudabilis!

tinued five years in office, and not, as was commonly the case, only one year. It has been also said, that this office could not be that of Censor; because, in some of the chartered cities, the Emperor was the Quinquennal; (79) which implies, that the office was supreme; while, on the contrary, the Censorship was considered in Rome, and in the subject cities, as an appointment of inferior rank. (80) These positions are, nevertheless, quite untenable. No direct comparison can be instituted, between the Censor and the Consul in Rome. They were not colleagues, nor had they the same Auspices. (81) But, if it were necessary to class these two offices in the order of their rank, the Censor must be placed above the Consulship; for, the previous discharge of the office of Consul was a necessary qualification for obtaining the Censorship, the last and highest of all the ordinary dignities. It is easy to prove, that the Quinquennal was different from the Duumvir juri dicundo. In inscriptions, the two offices are distinguished, when filled by

(79) Spartian. Hadr. C. 19. pr.

(80) Florez Medallas de España P. 1. p. 50. Eckhel doctr. num. vet. P. 1. Vol. 4. p. 476. Of the same opinion are J. Gothofr. ad L. 16. C. Th. de decur., (12. 1.) et ad L. 1. C. Th. de medicis, (13. 3.) and Roth. l. c. p. 90.

(81) Gellius, XIII, 14. in med.

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the same person. (82) In Marini's deeds, a Quinquennal is mentioned, along with the magistrates, in the same act, which implies their existence, as distinct functionaries, in the same city. In a list of the Decurions, (83) the Quinquennalicii are distinguished, and placed above the Duumviralicii. The truth is; that, the Quinquennal was exactly the magistrate called Censor, in Rome, and, in the subject cities, Censor, or Curator. (84) This opinion is favoured: 1. By the analogy of the Roman Censorship, with the Sicilian Census; since, both offices required renewal every fifth year. (85) 2. By the occurrence of the Quinquennals, in precisely the same order, in which the Curators are placed; and, in such circumstances, as to prove, almost beyond a doubt, that they were the Censors: for, their office was the highest of all, higher, even, than that of the Duumvirs; (86) and, it was, on that account, only

(82) Doni Inscr. class. 5. N. 84 "II. vir J. D., II. vir. quinq." N. 42. and 228. "IIII. vir Jur. Dic., IIII. vir. quinq."

(83) Fabretti Inscr. C. 9. p. 598. Frequent use shall be afterwards made of this very valuable Album.

(84) Otto de aedil. Colon. C. 8. §. 4. Marini papiri diplom. p. 250. not. 15.

(85) Cicero in Verrem, lib. 2. C. 56. says this of Sicily.

(86) According to the already quoted Album in Fabretti.—Likewise, in a deed in Marini, N. 74, the words—defensor, quinquennalis, et magistratus, occur in exactly the same

borne by those only who had filled all the rest. (87) 3. By the fact, of the Curator and Quinquennal being never, in a single passage, mentioned together. 4. By the circumstance of the Quinquennals of the time having made up the list of the Decurions quoted in Fabretti. (88) The enrolling of the Senate, both in Rome and in the chartered cities, was one of the principal duties of the Censors. 5. By the power of the Quinquennal being, on one occasion, expressly called Censorian. (89) The office of the Quin-

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order as—defensor, curator et magistratus, in the Constitutions, L. 5. C. Th. de exhib. reis. (9. 2.)—L. fin. C. Th. de superexact. (11. 8.)

(87) Apuleji metamorph. lib. 10. C. 223. p. 711. ed. Ruhnken. "Thiasus . . . gradatim permensis honoribus, quinquennali magistratui fuerat destinatus." Regarding the censorian power of the Quinquennal, the reader may consult a passage in Festus; although the part, here printed in *italics*, is only a restoration of the text; Quin*quennales censores appella*bantur, qui lustrum con*derent quinto quoque anno, a quo nominari* cœptos.

(88) Fabretti l. c. p. 598. N. 9. "M. Antonius Priscus, L. Annius Secundus, II. vir., quinquenn., nomina decurionum in aere incidenda curaverunt." In the same manner, the Quinquennals are found in other Censorian employments. Olivieri, l. c. p. 73.

(89) Inscription in Olivieri, l. c. p. 70. from Doni C. ii. N. 4. and Gudius: P. Lucilius, Decurio, Pontifex, II. vir, censoriae pot. quinquennal.

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quennal endured only one year. (90) It continued, therefore, vacant during the intervening four years; and, this explains, why the Quinquennals occur less frequently than the other magistrates. The duty of protecting the physicians and professors from civic burdens, was imposed on the Quinquennals, along with the Duumvirs. (91) In a deed, about the end of the fifth century, the same person filled, at the same time, both the situations of Quinquennal and Duumvir. (92)

The Defensors, and the Imperial Governors—Rectores—occur, likéwise, in Italy, and ought, therefore, to be noticed at present; but, since they are properly Provincial functionaries of great power, it seems better to postpone our remarks on them, until treating of the Provinces.

The Agens Vices was the Deputy of these City Magistrates.

The magistrates of cities had the right of deputing their powers, in some cases, to private individuals, who are then called Agentes

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(90) "Anno Quinquennalitatis Petinii Prisci." Inscription in Gruter, p. 322. num. 8. and Noris Cenotaph. Pisan. diss. 1. C. 5. fin. Noris is wrong, in refusing to admit the above deduction from the inscription. The best Text of the inscription is in Olivieri, l. c. 12. who explains it excellently in the notes, p. 63—91.

(91) L. 1. C. Th. de medicis (13. 3.)

(92) Marini papiri diplomat. No. 84.

The signification of the terms —Scriba—Excerptor—Actuarius—Notarius—Tribunus—Tabellio—Amanuensis—Cancellarius.

Vices, (93) and must not be mistaken for a particular class of magistrates.

It still remains to notice the officers of the Chancery, or the persons employed with the Records and books of Court, and with the preparation and copying of deeds, &c. On this subject, particular attention must be paid to the phraseology, which had been much changed, during the existence of the Roman power, and underwent still farther alterations, during the middle ages. (94) In the classic period, and in the times of the old Jurists, Scriba was the general term for a clerk of Court, (95) and Excerptor was a private copier;—either, a slave, or, a person whose services were hired for money. (96) The terms Actuarius and Notarius (97) had the same meaning; but, the last appellation denoted, like-

(93) Marini papiri diplom. No. 74., and the Notes there. Marini fratelli arvali, p. 547. They are also called Agentes Magisterium. Marini papiri, N. 83. In other cases, Agens Magistratum appears to denote the Magistrate himself. Marini pap. p. 272. The Deputes occur also in the Edict of Theoderic. art. 52.

(94) Compare,—Pancirolus in notitiam orientis C. 14. 19. 85.—J. Gothofredus ad Cod. Theod. VIII. 1. paratit. and ad L. 2.—Marini papiri diplom. p. 298.

(95) L. 18. §. 17. D. de muner. (50. 4.)—L. 4. C. de appellar. (7. 62.)

(96) L. 19. § 9. D. locati. (19. 2.)

(97) L. 1. § 6. D. de extraord. cognit. (50. 13.)

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wise, the particular mode of writing, by abbreviations, or short-hand. In the fourth and fifth centuries, the phraseology was quite different. Excerptor became the general term for a Clerk of Court. (98) Thus, in the Notitia dignitatum, Excerptores uniformly occur in every Chancery—Officium. (99) Every Curia had its Excerptor. (100) In the judicial establishment, he was the clerk of court, and was allowed certain fees—pro editione gestorum. (101) The title Notarius was now limited, in its application, to the Imperial Chancery, where there were many gradations in rank and employment. The chief among them were

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(98) Cramer suppl. ad Brisson. Kilon. 1813. 4. p. 22. not. 8.

(99) Whether, these were in the proper service of the State, and paid by the State with a fixed salary, the authorities are not decisive. Probably, the practice differed according to time and place.—L. 17. C. Th. de div. off. (8. 7). i. e.—L. 5. C. J. de numerar. (12. 50).—Pancirol. in notit. orientis, C. 19.—Gutherius de off. domus Augustae II. 14. See also below, chap. 5. text and notes, 111. 143. Concerning the persons employed in these offices, particularly the church Notarii, much useful information may be found in—Jo. Andr. Scmid de notariis ecclesiae tum orientalis tum occidentalis diss. triga. ed. 2. Lips. 1756. 4.

(100) L. 151. C. Th. de decur. (12. 1). Nov. Theod. T. 23. The deeds in Marini, for the following period, are noticed afterwards, chap. 5.

(101) L. 12. §. 1. C. de prox. sacr. scrin. (12. 19).

the Tribuni and Notarii, who made up the lists of the public officers and their salaries. (102) Tabelliones were the persons who, without any public appointment, employed themselves in preparing contracts, testaments, &c. In the beginning of the sixth century, they were called Amanuenses or Cancellarii. (103)

The Provincial Cities had Councils like those of Italy.

II. The provinces, undoubtedly, retained much of the primitive constitution of each country before its conquest by the Romans; and, this circumstance must lead us to expect wide differences in the original form of their Provincial government. (104) Under the Emperors, the condition of all the parts of the empire became daily more uniform; and the city Curia appears to have been universally the same, with the exception of a few insignificant peculiarities, in particular places or districts. Most of the constitutions, regarding the Decurions, either, were, at first, promulgated for the whole empire, or, had

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(102) Vales. ad Ammian. XVII. 5.—Pancirol. ad notit. orientis, C. 92.—Guther. de off. domus Aug. III. 9. Concerning these notarii, compare Cramer l. c.; and, regarding the Ab Actis of this period, consult the very learned treatise, in the same work, p. 12—30.

(103) Interpr. L. 1. C. Th. ad L. Corn. de falsis (9. 19). "Tabellio vero, qui amanuensis nunc vel cancellarius dicitur."

(104) The continuation of Niebuhr's Roman History will throw the first light on this difficult and almost neglected subject.

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their original application to particular countries, extended and made general by the Theodosian Code. Our previous remarks, therefore, on—the constitution of the Italian Curiæ—their occupation—their appointment—and their decline, may be applied, with slight modifications, to those of the Provincial cities. The terms Senatus and Senator, likewise, are not unfrequently used in the Provinces, instead of Curia and Decurio. (105)

But in them, there were no Magistrates similar to the Duumvirs.

The cities in the Provinces, had their Curiæ, as in Italy; but, an important difference existed in their magistracy. According to Roman ideas, there was a twofold public employment: the one attended with personal dignity and distinction—Honor,—and the other without either—Munus. (106) The Provincial cities, and particularly those of Gaul, (107) always possessed offices of the last kind; because, they were indispensable. Indeed, from these very peculiarities of the Munera, arose many of those acts of oppression, which reduced the Decurions to such an abject condition. The provincial cities may

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(105) Otto de aedil. colon. C. 2. §. 4.: where, both Provincial and Italian authorities are collected.

(106) L. 10. 12. 14. pr. D. de muner. (50. 4).—L. 5. C. Th. de decur. (12. 1).

(107) L 140. 148. C. Th. de decur. (12. 1).

have also had Honores of several kinds; particularly, in connexion with public religious worship; and, mention is, in fact, made of such appointments, in the cities of Gaul. (108) But, a Magistrate,—corresponding with the Italian Duumvir,—controlling the city and the Curia, and—presiding over the administration of justice, could never have been possessed by these Provincial cities; at least, never, during the period of the Emperors, to which our researches are, at present, confined. The truth of this opinion, regarding the cities of Gaul, and of the other Provinces, shall be afterwards confirmed; (108 a) but, the universality of the rule was subject to an exception, which is still preserved entire in the constitutions of later times, and which ought therefore to be noticed at present.

Unless the cities were free of Italy.

The Jus Italicum is most erroneously considered, by most writers, to refer to the personal condition of the citizens, although it related entirely to the city as a whole. It was generally possessed by the Italian cities, and was sometimes communicated as a privilege, to several Provincial ones. This Jus consisted of three branches. A. It conferred the rights of Quiritarian property in the land—Commer-

(108) Gruteri Inscript. p. 425. N. 1., and p. 476. N. 4. "Q. Julio Severino Sequano omnibus honoribus inter suos functo."

(108 a) [p. 58. and 73.]

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cium—and made it capable of becoming the object of—Mancipatio, Usucapio, and Vindicatio. None of these rights appertained to land in the Provinces, without this Jus; although, the possessors of the ordinary Provincial estates might acquire in them a species of property. B. Another benefit bestowed by the Jus Italicum, was the immunity, from every kind of direct taxation—Capitatio. The Provincials paid either a land—or a poll-tax. In reference to these imposts, those who possessed estates were called—Possessores, and the other inhabitants of the Provinces—Tributarii. The two expressions denote the liability to pay these taxes, and distinguish the one obligation from the other. The inhabitants of Italy were generally exempt from both, and the Provincial cities, free of Italy, possessed, consequently, the same privilege. C. The Jus Italicum also conferred a civic constitution, in the Italian form, as already described. (108 b) These three rights, when possessed by the Provincial cities, were call-

(108 b) See above, p. 16. 53. Also Savigny on this Jus, in the "Zeitschrift für geschichtliche Rechtswissenschaft," B. 5. S. 242.; or, his Treatise, on the Roman System of Taxation, and the authorities there quoted, in the "Abhandlungen der Berliner Academie von 1822 und 1823. (historich-philologische-klasse," S. 27.) Berlin. 1825. [See below, p. 294., and Spence's Origin of Laws, p. 32. 77. Lond. 1826, 8vo.]

ed the Jus Italicum. That the Decurio-constitution was an integral part of this Jus, is plain from a passage of Ulpian, (109) and from many coins of those Provincial cities, which are known to have been free of Italy. On these coins is impressed the statue of Silenus, (110) in a standing posture; and, this figure (111) was the proper emblem of civic independence. Our accounts of the cities, which possessed the Jus Italicum, are very deficient. Pliny is our source of information, regarding a few in Spain and Illyricum: (112) the Constitutions, regarding Constantinople: (113) and, the Pandects, regarding a number of others. (114) But Justinian's com-

(109) L. 1. §. 2. D. de censibus (50. 15.): "Est et Heliopolitana, quae a D. Severo, per belli civilis occasionem, Italicae coloniae rempublicam accepit."

(110) Eckhel doctrina num. veterum P. 1. Vol. 4. p. 493—496.

(111) Servius ad Virgil. Aen. IV. 58. ed Paris. 1600 f. p. 316: "Patrique Lyaeo: qui . . . urbibus libertatis est deus, unde etiam Marsyas minister ejus per civitates in foro positus libertatis indicium est: qui erecta manu testatur nihil urbi deesse." So also on Aen. III. 20. p. 263. *Concerning* the identity of Silenus and Marcyas, see Eckhel, l. c.—In other respects, Eckhel has adopted the common prejudices, regarding the Jus Italicum, and therefore considers Servius's statement as erroneous.

(112) Plinius hist. nat. III. 3. and 21.

(113) Cod. Th. XIV. 13. and Cod. J. XI. 20.

(114) Tit. D. de censibus (50. 15).

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pilators felt no interest, in the Western countries; and, by mere accident, accounts have been preserved of three cities only, free of Italy, in the whole of Gaul. These are, Lyons, Vienne, and Cologne. (115) Many others may have possessed this Jus. The inhabitants of Sicily received, under Cæsar, the Jus Latinitatis, and, after his death, the Jus Civitatis (116); and, the Sicilian cities, probably received the Jus Italicum, or became free of Italy, about the same time. It may be considered as a sure indication of this Jus, when the title of an admitted Italian city-magistrate, e. g. the Duumvirs, is found on the inscriptions of a Provincial city.

This proved regarding the Cities of Gaul.

Premising, therefore, that these privileged cities are exceptions to the Rule, and that they possessed Magistrates, with jurisdiction, in the later times also, we may now endeavour to illustrate the opinion—of there having been no proper Magistrates in the ordinary Provincial cities,—with particular reference to Gaul; since, that country, after Italy, is the most intimately connected with our subject in the following centuries. When Gaul, on the north side of the Alps, (117) came under

(115) L. 8. §. 1. 2. D. de censibus (50. 15).

(116) Cicero ad Atticum XIV. 12. princ.

(117) Gaul, on the south side of the Alps, was, at a very early period, united to Italy, and is not therefore included in the above remarks.

Roman dominion, it consisted of independent tribes,—Civitates. These possessed, in some instances, a considerable number of cities, (118) and were all under a strict aristocratical constitution. (119) The names and boundaries of these tribes were very long preserved. (120 It is possible, that they may have maintained, for a certain period, a political connection with each other, under, Roman Control; but, when the Decurio-Constitution was fully developed, and universally introduced, that connection could hardly have been continued. In order to make its endurance conceivable, it must be supposed, either, —that only the principal city of each Civitas possessed a Curia with Decurions, and that the others were ruled by it, or,—that the Curia of the principal city possessed a different and higher authority than the Curiae of the others. The first supposition is contradicted both,—by the express testimony of Salvianus, who, in the fifth century, attri-

(118) Caesar de Bello Gallico, I. 2. 4. 5. II. 4. VIII. 2. The Civitas Helvetiorum contained 12 oppida; and 'the civ. Suessionum,' as many. The Cities gave their names to the Tribes only at a much later period.

(119) Caesar, l. c. VII. 11—20. and II. 5. Senatus Remorum.

(120) The Notitia Galliæ.—(Sec. 5.) in Sirmond. Concil. Gall. T. 1, and prefixed to Dubos his. critique. p. 46. Paris, 1742, 4to.—enumerates 113 civitates, 5 castra, and one portus.

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butes Decurions even to places of small extent; (121) and,—by the testament of Widrad, in the time of the Franks; which proves the existence of the civic constitution in a mere Castrum. (122) The second supposition is opposed to the whole contents of the Theodosian Code; where, the very numerous constitutions regarding Decurions, often, indeed, regarding those of Gaul in particular, constantly imply complete quality, without even alluding to any of these alleged subordinate gradations. If the distinction had existed, it must, infallibly, have been mentioned. No doubt, most of the old nobility of Gaul were to be found, in the Curiae of the chief cities; and, thence may have arisen, in subsequent times, a very great practical difference in authority and dignity. (123) But, as far as the law and

(121) Salvianus de gubernatione dei, lib. 5. C. 4. "Quae enim sunt non modo urbes, sed eniam municipia atque vici, ubi non quot curiales fuerint, tot tyranni sint? .... Quis ergo, ut dixi, locus est ubi non a principalibus civitatum viduarum et pupillorum viscera devorentur ...?"

(122) See below, chap. 5. n. 45.

(123) The names of the tribes being changed into those of the chief cities, is a proof of the preponderating influence of the latter. The Senators and Senatorial families, so frequently mentioned by Gregory of Tours (e. g. II. 33. III. 9. 15. X. 31. and in other places), were the old nobility who had become members of the Curiæ of the chief cities. See Ducange v. Senatores, T. 6. p. 356, and the passage from St Avitus, below chap. 5. n. 15. The discovery, that such distinctions in

constitution were concerned, no distinction existed: and there were universally, within every city and its territory,—the same dependence upon the Governor of the province,—the same rights, and—the same routine of public affairs. This view is farther confirmed, by the circumstance, that in the totally different times of the Franks, the Curia of Angers, the chief city of a Civitas, contained a Defensor and Decurions, in the same manner as any of the inferior cities. (124)

The truth of the above assertion,—that the Provincial Cities possessed no proper Magistrates similar to the Duumvirs, is susceptible, however, of a clearer proof in the cities of Gaul than in those of any of the other Provinces.

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the Nomenclature had occurred, may have occasioned the following strange opinion of Dubos, upon which later French authors build, as upon undoubted history. In every Civitas, says he, there were—1st, Patricians, from whom the Senatus was chosen. 2d, Curiales, who voted in the Curiae, i. e. in the assemblies of the people; and, from these Curiales, a second and inferior Council, composed of the Decurions, was elected. 3d, Possessores. 4th, Opifices. Hist. Crit. L. i. C. 2. p. 19–23. Each civitas had, also, its own troops! And, notwithstanding the sovereignty and power of the Civitates and their functionaries, each was placed under the control of an imperial Comes. Dubos farther maintains, that the same system continued, under the Franks! l. c. C. 3. p. 23–29.

(124) See below, chap. 5. n. 47.

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The Principals were not proper Magistrates.

Among the duties of the Duumvirs, which were equally indispensable, in the Provincial and in the Italian cities, was the direction of the Curia. Fortunately, there is an account of this matter, applicable to the whole of Gaul, in the following passage. (125) Placuit, principales viros e curia in Galliis non ante discedere, quam quindecennium *in ordinis sui administratione* compleverint.. ... Sane quoniam principalem locum et *gubernacula urbium* probatos administrare ipsa magnitudo deposcit, sine ordinis praejudicio, consensu curiae eligendos esse censemus, qui contemplatione actuum omnium possint respondere judicio. Eum vero, qui *usque ad secundum evectus locum*, administrationem aut aetate implere aut debilitate nequiverit, suffragium meritorum et transactae testimonium vitae, tamquam primus constituto tempore *curiam rexerit* obtinere conveniet. According to this quotation, it had become the custom in Gaul, to allow the first among the Decurions, or the first on the roll, to preside over the Curia, and to take the principal direction of the City-business—ordinis administratio, gubernacula urbium, curiam regere. This Decurion was called Principalis. (125 a.) But, it might happen that, upon the removal of the Principal, his successor in

(125) L. 171. C. Th. de decur. (12. 1.) of the year 409.
(125 a.) p. 20. and 28.

the order of the roll of the Decurions—usque ad secundum evectus locum—might be unfit, from age or other causes, to perform the duties of that office. In this case, Honorius allows the Curia to choose a Principal, but, without prejudice to the rank of the proper successor,—sine ordinis prejudicio,—who shall nevertheless be the first in the Curia, and entitled to all the other privileges of that situation. The Principal continued in place during life; at least, he had no right to retire, until he had discharged the office, during fifteen years; a period of service, which the already oldest Decurion on the roll could seldom survive. This highly remarkable passage reflects, also, a clear light upon others, in which the honours of that office are more amply explained. The rank of the Principal as a Comes, corresponded with his years of service. (126) Where such a Principal existed, no magistrate could be. Their coexistence was neither necessary nor possible; and the Curia's right of election, admitted in the case of the magistrate, was, in the case of the Principal, an innovation, to meet a particu-

(126) L. 75. 127. 189. C. Th. de decur. (12. 1.) In the last passage, the words 'per quinquennium dignitate praestita,' contain a clear proof, that the office bore the same character in Alexandria, as, in the cities of Gaul.

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lar emergency. To this it may be objected, that the Principal himself was properly a magistrate, and that the only difference, between him and the Duumvir, consisted in the name, and in the manner of appointment. But, the distinction is, according to Roman ideas, much more real. The Principal re-resembled our speaker, moderator, or chairman; while, the magistrate had a proper and personal rank. The former, without being chosen, and merely when it came to his turn, might enter upon his office, and continue in it, during life; but, both of these peculiarities were excluded, in the case of the magistrate. By these intrinsic reasons, and in the absence of all express authority on the subject, we are entitled to deny the Principal all jurisdiction; and, without civic jurisdiction, his office could not, possibly, have been a proper magistracy, like that of the Duumvirs.

Nor were the Honorati, Curiales, Possessores.

Another proof, likewise applicable to Gaul, is contained in the Constitution of Honorius, regarding the assembly of the Estates at Arles, in A. C. 418. (127) A diet of the Pro-

(127) This remarkable constitution is accurately published in Sirmond's notes to his edition of Sidonius Apollinaris, p. 147. It is also quoted, in Hincmar, Ep. 44. de jure metropolitanorum, Cap. 18. T. 2. opp. p. 730. And in Nic. Cusanus de concordantia catholica, Lib. 3. cap. 35. More recently, it has been reprinted, among others, by Bouquet,

vinces of Gaul was appointed to be held annually in that city; and the Constitution calls to this meeting of the states the—Judices Provinciarum—i. e. the Imperial Governors—the Honorati—Curiales—and Possessores. The first three classes are cited to appear, under the penalty of a fine, for non-attendance. Now, the meaning of Honorati is the essential point. That term might perhaps signify the city magistrates, whose existence in Gaul would be consequently proved; and, the original meaning of Honor is not at variance with this supposition. But, the question must be differently answered; and, our reply rests upon the most decisive authorities. The Honorati, in the later times of the Imperial Government, were those persons, who had been the superior officers of the empire, e. g. governors of Provinces. These, when residing in Provincial cities, formed a particular order, and are very frequently mentioned before the Decurions, of whom they took the precedence in rank. (128) If this explan-

T. 1. p. 766.—Hincmarc calls Theodosius and Honorius the authors, and Cusanus attributes it to the Emperor Constantine: but, the best edition of this Constitution may be found, in—Codicis Theodosiani, libri V. priores. Ed. Wenck. Lips. 1825. 8vo, p. 371; where it is accompanied, by a full literary notice.

(128) J. Gothofred., ad C. Theod. I. 8., treats fully of the Honorati. Brissonius, and Heineccius, in his additions, con-

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ation be admitted, there were summoned to the Diet—the acting and retired officers of the empire—the Decurions and—the Provincial landed proprietors. The city Magistrates are, consequently, not at all named; and, that they have been omitted, upon an occasion, where there were so many reasons for mentioning them, is certainly a strong proof, against their existence.

Perhaps, a few of the principal cities in Gaul had Magistrates.

Still, the difficulty remains—that, in many of the cities of Gaul, magistrates, in the proper sense, seem to be expressly mentioned. The most celebrated of these is the consulship of Bourdeaux, noticed by Ausonius. (129)

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found all the distinctions of time. See Bris. de Verb. Sign. cura Hun. et Böhm. Hal. Magd. 1743. V. Honoratus. Some of the most decisive passages are—L. 3. C. de. off. div. jud. (1. 48.) '. . honoratis viris, quibus etiam consistorium nostrum ingrediendi facultas praebetur.' How could this be maintained of the city magistrates?—L. un. C. de honorat. vehic. (11. 19.) "Omnes honorati, seu civilium, seu militarium, vehiculis dignitatis suae, id est carrucis, intra urbem sacratissimi nominis semper utantur."—L. 1. 2. 3. C. Th. ne quid publ. leat. (8. 11.) These three laws of the Theodosian Code refer to one and the same subject; and, the very persons, who, in the two last, are styled Honorati, are called, in the first, "viri per provincias emerito jam honore polentes." Finally, consult Nov. Theod. Tit. 48.

(129) Ausonius de claris urbibus in the two last verses;

Diligo Burdigalam; Romam colo: civis in hac sum,
Consul in ambabus. Cunae hic, ibi sella curulis.

It has been proposed to read—Consul in hac sum, civis in ambabus. Of less importance are the Consuls of Rheims and Poictiers mentioned on coins and inscriptions. See Otto de aedil. colon. C. 2. §. 4.

A Duumvir occurs also in the Civitas Sequanorum; but, this may perhaps bear another signification. (130) If, however, these authorities were quite undoubted, and it were certain, that these cities had never received the jus Italicum, the magistrates might still be considered, as merely a remnant of the old precedency, claimed by the chief cities. (130 a.) In this view, the case would only be an exception, and a very rare departure from the rule; as is perfectly plain, from the general expressions of the constitution of Honorius.

The Roman Governor was the Judex Ordinarius, in the common Provincial Cities.

In the provinces, therefore, the ordinary jurisdiction was, exclusively, in the hands of the Roman Governor: and, it was partly exercised, by him, in proper person, during his frequent circuits through the Province, and partly, by his Legats. From this circumstance, may be explained the title,—Judex Or-

(130) Gruteri Inscr. p. 13. N. 15. "Q. Adginnius . . . Flamen II. vir in civitate Sequanorum." Perhaps, however, Flamen and II. vir ought to be read together; and, in this case, there would be no proper Consular Duumvirate, but only a clerical office. In support of this opinion, we may refer to three Inscriptions in Gruter, p. 489. N. 9.—"L. Voconio . . II. vir. II vir. Flam."—ibid N. 10. "C. Voconio . . Aed. II. viro. II. Flamini II. quaestori Saliorum magistro,"—and p. p. 376. N. 1. "L. Blandius . . . . IIIIII. vir. et Augustalis et Flaminalis."

(130 a.) See above, p. 60.

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dinarius,—which the Governors bore, in later times. (131) The cities, free of Italy, were exceptions from this rule. They had proper magistrates, with jurisdiction; but, a right of appeal, from their judgment to the Governor, undoubtedly existed, at a very early period. When, therefore, mention is made of Duumvirs in the Provinces, the statement must be referred solely to the cities, in possession of the Jus Italicum. (132) Nothing was changed, in this relation, by the general right of Roman citizenship, which Caracalla granted to all the countries and cities of the empire; for, there is no trace whatever that this grant produced any other alterations, than on the personal condition of individuals.

Provincial City Magistrates, being rare, are seldom mentioned.

That the classic Jurists frequently mention the city magistrates, as a general institution, is easily explained, by the circumstance of their residence in Italy; where, these were

(131) Nov. Theod T. 23. "Consularem et praesidem, qui vetustatis privilegio ordinariorum judicum nomen obtinent." L. 3. C. Th. de raparat. appel. (11. 31). In the same sense, Judex, without any additional term, occurs frequently in both the collections of Constitutions.

(132) Thus, in Spain,—Concil. Eliberitanum. a. 305. C. 56. in Mansi, T. 2. p. 15.—"Magistratum vero uno anno, quo agit duumviratum, prohibendum placuit, ut se ab ecclesia cohibeat." And, in Illyricum, L. 177. C. Th. de decur. (12. 1). In both countries, we know, that there were cities with the Jus Italicum. See above, p. 57.

universally introduced. The opinion—of the ordinary Provincial cities having possessed no proper magistrates—explains, likewise, in an easy and natural manner, why, our knowledge of the city magistrates is so defective and imperfect, notwithstanding, the very minute accounts, which we possess of the Decurions. The Theodosian Code, although it was universally received as law, had been prepared in Constantinople, and was, principally, intended for the Eastern Empire. Even, the laws of Justinian were compiled merely for the East: and, the projected conquest of Italy could have had no effect whatever, upon the selection, made for that legislation. These authorities were not composed for Italy, but, for the Provinces of the empire; where, the Decurions formed the general rule, and the Magistrates, the rare exception. The almost total omission of the Civic Magistrates of the Provincial cities, in these collections is, on any other supposition, inexplicable; and, this circumstance serves, in no small degree, to confirm our theory.

Defensors were elected in the Provincial Cities, by the whole citizens.

The introduction of the Defensores, however, made an essential change on the condition of the Provincial cities. (133) In the

(133) (1.) Law authorities: Cod. Th. I. 11.—Nov. Major. T. 5.—Cod. J. I. 55. Nov. Just. 15. (2.) Authors: —Jac. Gothofred. paratit. C. Th. I. 11. J. Chr. Schmid

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Pandects, and until about the time of Constantine, this term is applied to the persons who, without any durable appointment, had the temporary charge of some of the city affairs. (134) The office became permanent, and assumed its abiding form, only in A. C. 365. (135) The introduction of the Defensors is, consequently, to be placed in the first half, or about the middle, of the fourth century. They were called—Defensores Civitatis, Plebis, Loci. (136) Not merely the Decurions, but, the whole citizens voted, at their election. (137) The Italian city magistrate could be chosen only from the Decurions; but, no Decurion could be elected Defensor. (138) The Defensor's office endured for five years, and, since Justi-

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diss. de civitatum defensoribus. Lips. 1759. 4. Their history, to the time of Justinian, is given above.

(134) L. 1. §. 2.—L. 16. §. 3.—L. 18. §. 13. D. de muner, (50. 4.) The first is from Hermogenian, the last from Arcadius Charisius.

(135) L. 1. C. de defensor. (1. 55.)

(136) They must be carefully distinguished from the Defensors of the Church; which was, at first, a clerical, and, afterwards, a secular office.

(137) L. 1. Interp. C. Th. de. defens. (1. 11.)—L. 8. pr. C. J. eod. (1. 55.)—L. 19. C. J. de ep. aud. (1. 4.) Nov. 15. C. 1.

(138) L. 2. C. de. defens. (1. 55.) Justinian, afterwards, changed this, by Nov. 15. C. 1.

nian, for two. (139) His principal duty was, as the name implies, to afford protection against the oppressions of the Provincial governor. (140.) But, at the same time, the Defensor received a subordinate civil jurisdiction; at first, to the amount of 50 solidi, and, since Justinian, of 300. (141) Justinian allowed him also an Exceptor and two Officials. An appeal lay from him, to the Governor. (142) He had not the right of Mulcta, or of fining those who failed in respect to him; (143) but, he might appoint tutors and curators. (144) His right to exercise the voluntaria jurisdictio shall be, afterwards, examined. (144 a.) In criminal matters, he

(139) L. 4. princ. C. de defens. (1. 55).—Nov. 15. C. 1. §. 1. and epil.

(140) L. 4. C. de defens. (1. 55.)

(141) L. 1. C. de defens. (1. 55.)—Nov. 15. C. 3. §. 2. and C. 4. 300 solidi are 30,000 sesterces, and, consequently, double the sum, which limited the competency of the magistrates in Cisalpine Gaul. See above, p. 37. If the solidus, since the time of Constantine, be reckoned worth $1\frac{1}{3}$ ducats, the amount is 400 ducats, or about 200 guineas, Eisenschmid de ponderibus, sect. 4. p. 140. From their being placed, on an equality with magistrates, in Nov. 15. Pref. and C. 1., it is not improbable, that this was the very sum, which limited the competency of the city magistrates in the earlier times. See above, p. 36. 39.

(142) Nov. 15. C. 3. §. 1. fin.

(143) L. 2. C. Th. de defens. (1. 11.)

(144) §. 5. J. de Atil. tut. (1. 20.)—L. 30. princ. C. de episc. aud. (1. 4.)

(144 a.) See below, p. 89. and 95.

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had, merely, the preparatory procedure; but, Justinian allowed him to decide, in small cases. (145) From this account of the mode of election, and of the gradually increased powers of the Defensors, it is plain, that they were originally appointed for the defence of individuals, and not in order to preside in the Curia, or to represent and govern the civic community. This is the cause, why, in the Constitution of the year 409, (145 a.) the Curiæ in Gaul are said to be directed, by the Principals, without the least mention of the Defensors: although, their office must have existed, long before that time.

The Defensors became proper Magistrates in the Provincial Cities.

The Defensors, however, gradually acquired some of the rights of magistrates, and became the Presidents of the Curia, as will be immediately explained, from their common exercise of jurisdiction. Justinian, indeed, raised them to the rank of proper magistrates; (146) and, by that innovation, introduced magistrates generally over the Eastern Empire. But, the Defensors possessed these magisterial rights only where there were no magistrates. This is expressly

(145) L. 7. C. de defens. (1. 55).—Nov. 15. C. 6. §. 1.

(145 a.) See above, p. 62.

(146) Justinian mentions this, in Nov. 15. praef. and C. 1.

stated in the passages regarding the nomination of Tutors, and the solemn Civic Acts. (147) In the authorities, regarding the Defensor's jurisdiction, this distinction is, indeed, only tacitly implied; for, in them, the Defensors and Governors are mentioned, while the magistrates, (148) are omitted: which, however, could never have happened, if proper Magistrates had existed. An attempt has been made to explain this omission by supposing, that the Magistrates were gradually supplanted by the Defensors: (149) but, the distinction is founded on the earliest authorities concerning the Defensors, (150) while, on the other hand, the Defensors were so far from having superseded the Magistrates, at this period, that, they occur together even in the sixth century. These circumstances may, therefore, be considered as new proofs (150 a.) in favour of our theory,—that the provincial cities, generally, had no Magistrates, and that the Defensors supplied

(147) §. 5. J. de Atil. tut. (1. 20.) See below, n. 204.

(148) L. 1. C. de defens. (1. 55).—Nov. 15. C. 3. 4. In the same manner, in L. 22. pr. L. 34. §. 5. 6. C. de. ep. and, (1. 4), the Governors and Defensors alone are addressed.

(149) Roth. L. c. p. 103.

(150) L. 1. C. de defens. (1. 55). A. C. 365.

(150 a.) See above, p. 55.

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this defect;—at first, indeed, only in a limited and partial manner; but, since the time of Justinian, altogether and completely. The Defensors, therefore, ultimately acquired high authority in the Provinces; but, in Italy, where magistrates universally existed, they always remained within the original boundaries of their office. That they existed, however, in Italy is also proved, both from Cassiodor, (151) and from several deeds in Marini, (152) where they occur, along with the magistrates, and take precedence of them, as Presidents of the Curia. This superiority of rank can only be explained, by supposing, that their office, as the most recently created, and as founded and cherished by the Emperors, had acquired the respect, due to the older Institution.

The Councils of the Italian and Provincial Cities contained 100 Members. Patroni—Pedani—Prætextati—Decemprimi—Principales &c.

Having now explained the Constitution of the Italian and Provincial cities, we are enabled to discuss the internal structure of their Curiæ. The regular number of members appears to have been 100; (153) although, this rule was never strictly and generally

(151) M. A. Cassiod. Variarum vii. xi., in the Biblioth. Vet. Patrum. Lugd. 1679. T. xi. p. 1190. See above, p. 50.

(152) Marini. papiri diplomat. e. g. No. 74. 'defensor, quinquennalis et magistratus.'

(153) So, in Capua. Cic. in Rullum II. 35. med.: and, likewise, the 'centumviri municipii Augusti Vejentis' in Fabretti inscr. C. 3. p. 170. N. 324. princ.

followed. The roll of the Decurions—Album—contained both honorary members,—Patroni—and ordinary members. The Patroni stood first on the Roll, and were made in two ways: 1, when Decurions were exempted from active service, because they had filled high offices of the state; (154) and, 2, when the Curia promoted to that rank eminent men, not already Decurions, either in compliment to these individuals, or with the view of increasing the respect for their own body. (155) Among the ordinary Decurions, those stood first, who had been Magistrates, and they were classed according to the rank of their offices. When several had filled the same office, then the length of service was the rule of precedence. The ordinary Decurions, who had not filled any offices, were classed, according to the length of time they had sat in the Curia. (156) In the cities, where there were no magistrates, length of service alone decided the rank of the Decurions; and, by the same rule, the Director or President of the Curia—Principalis—was also

(154) See above, p. 27. L. 61. C. Th. de decur. (12. 1)., & L. 2. D. de albo scribendo (50. 3). refer to this case.

(155) L. 46. C. Th. de cursu publico (8. 5). "si ... per suffragium ad curiarum honorarium patronatum ... adspirasse doceantur.

(156) L. 1. D. de albo scrib. (50. 3).

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generally chosen. (157) These regulations are explained, and confirmed by the Album of the city of Canusium, in Apulia, A. C. 223, which has come down to our times. (158) In it, the names of the Decurions are all given, and they are classed in the following order.

30 patroni C. C. V. V.—clarissimi viri, Roman Senators.
2 patroni E. E. Q. Q. R. R.—equites Romani.
7 quinquennalicii.
4 allecti inter quinquennales.
22 duumviralicii.
19 aedilicii.
9 quaestoricii.
21 pedani.
34 praetextati.

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(157) See above, p. 63.

(158) Fabretti Inscr. C. 9. p. 598. N. 9. There are several works on the Album of Canusium, with which I am unacquainted. See Christ. Saxi. Onomast. Literar. T. 6. p. 491. 492.—"Abbatis Damadeni aes redivivum Canusinum," in Grævii Thesaurus Ant. et Hist. Italiæ, T. 9. Pars. 5., is a diffuse and inaccurate Commentary. It contains the common error (see above, p. 46. inf.) of the Duumvirs being styled Quinquennals, when they held their office, during 5 years; C. 19. 24. 25. fin. The author, p. 60. 84. 105., likewise considers the Decurions to be magistrates, chosen

Our attempts to explain the distinction between the Pedani and Prætextati have not been successful. Fabretti maintains, (159) that the Prætextati were those, who had the expectancy of an office, but, had not actually obtained it. If this opinion be correct, all were Prætextati who had the census of Decurions, (160) until they obtained a place, among the legal number of ordinary Decurions: or, according to Niebuhr's supposition, all the sons of the Decurions,

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every year, and entitled, from their rank, to wear the Prætexta! By this circumstance of wearing the Prætexta, he explains the Prætextati to be—the youngest Decurions. He does not, however, maintain, that they wore the Prætexta, on account of their youth; but, because they, as yet, enjoyed no other title and honour, than such as arose from belonging to the order of Decurions. They were, therefore, obliged to rest satisfied with the prerogative of wearing the Prætexta, the most common and humblest privilege of the mere Decurion.

(159) Fabretti, l. c. p. 658. states, what is plainly inaccurate,—that, after deduction of the Patroni and Prætextati, precisely 100 remain.—Concerning the 'Senatores Pedarii,' see Gellius III. 18. & S. Pitisci Lex. Ant. Rom. v. Pedanii.—The Prætexta was, in the chartered cities likewise, the distinction of the Magistrates while in office, Liv. XXXIV. 7. princ. & Pitis. Lex. v. Prætexta.; and was worn only by them and by young men or boys. The sons of Senators—Prætextati—seem to have been allowed to attend the debates, in the Roman Senate, along with their fathers. Macrobii Saturn. L. 1. c. 6. in fin.

(160) Noris cenotaph. Pisan. diss. 1. C. 3. p. 72–74.

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who had not yet attained the legal age, which was necessary before they could take an active part in the duties of the Curia, were called Prætextati. In a great many cities, the first places, on the roll of ordinary Decurions, were considered as more honourable than the rest. Most frequently, this distinction included the first ten,—Decemprimi. The earliest instance of this occurs, in the year of the city 550, when, the Roman Senate ordered the attendance of the magistrates and the ten leading men of the twelve refractory Latin cities. (161) Examples of it are, afterwards, found in the cities of Ameria, Centuripe, Pisa, (162) and, even at the end of the fifth century, in Syracuse. (163) The Decemprimi were also distinguished, from the rest, in the rolls of the Curia. (164) Sometimes, the whole responsibility was limited to them; and, sometimes, they enjoyed immunities, regarding corporal punishment; but, their fines were higher than those of the

(161) Livius XXIX. 15. "magistratus decnosque principes."

(162) Cicero—pro Rosc. Amer. C. 9. med.—in Verrem, lib. 2. C. 67. med: and, Cenotaph. Pisan. Tab. 1.

(163) Marini papiri diplom. N. 83. The decemprimi are very oddly designated there, by an XI.: viz. X. (decem), and I (primi).

(164) In Gruter. inscr. N. 2. p. 302, 'clarissimi viri.' are first mentioned; then, 'item X. primi;' finally, 'item ordo.' cf. Ritter Praef. C. Theod. T. 4.

other Decurions. (165) In other cities, and on particular occasions, there occur V, VI, VII, XV primi. (166) Such honourable mention of the first Decurions was, certainly, not a general practice. It is not to be found in Fabretti's Album; and, even where the distinction is admitted, the Decemprimi formed only a more distinguished class of the Decurions, and not a particular collegium, or committee, exclusively intrusted with a part of the city affairs. According to the prevailing opinion, such a committee was formed by the Principals, who are said by some to have been chosen by their colleagues, for the purpose of managing exclusively a particular branch of the public business. (167) This opinion arises entirely, from misunderstanding the ambiguous term—Principalis. That title was often applied to the first in the Curia, who, commonly, obtained that situation, by length of service, but, in particular cases, by election. (168) In some passages, the Duumvirs bear that name.

(165) L. 39. C. Th. de episc. (16. 2).—L. 2. fin. C. Th. de quaest. (9. 35).—L. 54. med. C. Th. de heret. (16. 5).

(166) L. 190. C. Th. de decur. (12. 1).—L. 10. C. J. de professor. (10. 52).—Noris cenotaph. Pisan. diss. 1. C. 3. p. 64. 65.

(167) J. Gothofred. parat. C. Th. XII. 1. Roth. l. c. p. 71. 79. n. 76.

(168) See above, p. 63.

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(169) In others, the ordinary Decurions, in opposition to the Plebeians, are called Principals. (170) Frequently, those bearing that title are opposed to the ordinary Decurions; and, on these occasions, the Principals are clearly the Decemprimi. (171) These various significations are the cause, why, in many passages, the exact meaning of the term cannot, with certainty, be discovered; but, undoubtedly, the Principals are nowhere described as a small and exclusive committee, for which, in fact, there was no place in the civic Constitution.

The Powers of the Imperial Governor were different under Constantine and Justinian.

Hitherto, our remarks have been confined to the internal Constitution of the cities; but, we must now consider the Imperial Governors, under whose controul the cities were placed. At first, these existed in the Pro-

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(169) L. 77. C. Th. de decur. (12. 1).—Isidor. origines IX. 4. med.

(170) Fabretti Inscript. C. 2. N. 250. "primo principali." Salvian. de gubernatione dei, p. 103. Ed. Baluz. Paris. 1669. (See above, note 121). Compare—the passages in the note, Baluz. Miscellan. T. 2. p. 491. infr. Paris. 1679. 8vo.—L. 4. C. I. de nat. lib. (5. 27).—L. 128. 189. C. Th. de decur. (12. 1).—L. 2. princ. C. Th. de praediis (12. 3). The distinction occurs, likewise, in the Ordinance, that the Gesta shall be completed, before three Principals (see below, n. 200.); and, it is also found, in Marini's Deeds. See below, Chap. 5.

(171) L. 52. med. compared with L. 54. med. C. Th. de heret. (16. 5).

vinces alone. They were gradually, however, introduced into Italy. (171 a) No alteration, in this respect, was made by Constantine's system, which continued, until the dissolution of the Western Empire; (172) excepting that the powers of the Governor were different, when a city possessed Magistrates, and when it was without them; and different, consequently, in Italy, and in the Provinces. The fundamental principle of the Constitution of Constantine, was the complete separation of the civil, from the military power; and, this existed at the period, when the Roman Government, over the West, was extinguished. Justinian, at first, preserved the same distinction in the East; but, afterwards, departed from it, and reunited both powers. (173)

The civil administration was in the hands of a Governor—Rector, Judex, Judex Ordinarius;—and, of these there were three orders—Consulares, Correctores, and Prasides; (174) but, the distinctions consisted entirely

The Civil Governor was called —Rector— Judex— Judex Ordinarius; and, the Military—Comes—Dux.

(171 a) See above, p. 50.

(172) One of the most important authorities, on the internal organization of the Empire during this period, is the Notitia Dignitatum.

(173) Cod. Just. 1. 45. 46. 49. Nov. 24—31. We shall afterwards speak of that Emperor's institutions in Italy.

(174) In the time of the old Jurists, Præses was still the common name of the Governor. Digest. 1. 18.

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in the extent and rank of their provinces, and not in the greatness of their powers. The military control over particular parts of the Empire, was divided among many Duces, under the general superintendance of the Magistri Militum; and, several of these Duces were styled Comites. The title of Comes, which conferred, at first, merely dignity and rank, and was susceptible of various gradations—Comes primi ordinis, &c.—might be bestowed on the Duces, and on almost all the other officers, however dissimilar their employments. In some important Ducati, the Dux constantly received this title. In these, the appellation Dux entirely disappeared, and Comes became the official term of address. (175) This occurred, particularly, on the frontiers; e. g. on those of the Rhine. (176) The Comes was, therefore, always a higher military officer than the Dux. (177) The fundamental principle of Constantine seems to have been disregarded in particular cases, by intrusting civil and military power to the same person. (178) The military commanders had also

(175) Cod. Th. VI. 14.

(176) L. 9. C. Th. de re milit. (7. 1.)

(177) L. 11. fin. C. Th. de div. officiis (8. 7.)

(178) Maffei Verona illustrata, T. 1. lib. 8. p. 340, 343, ed. 8vo, and in the printed Inscriptions, No. 47. 48. Am-

a certain extent of jurisdiction; although on this subject, the Constitutions speak, in somewhat doubtful terms. By the first rule, all civil questions, even of the soldiers, were, without exception, competent before the Governor of the province alone; while, the military commander had the right of judging in criminal matters, when the accused was a soldier. (179) But, afterwards, civil business also was transferred to the Magister Militum; not merely, when both parties, but when the defendant alone, belonged to the army. In this last case, however, the consent of the plaintiff seems to have been necessary: (180) because, three years afterwards, it was ordained, under a heavy pecuniary penalty, that no Privatus should be compelled to appear, either as plaintiff or defendant, before a military Judge. (181) Of the three Constitutions containing these very different ordinances, the first only has

mian. Marcell. XXVI. 8. fin. A. C. 365. and note T. 3. p. 161. Ed. Wagner. Lips. 1808. Cassiodor. Variarum, VI. 12. 21. and V. 14.—regarding the regular division of the civil and military powers. And VII. 1.—regarding their union, as forming the exceptions.

(179) L. 2. and Interp. C. Th. de jurisdict. (2. 1.) A. C. 355. The L. 9. eod. A. C. 397. inculcates this, under the threat of punishing the principal party by banishment, and his Advocate by fine.

(180) L. 6. C. Just. de jurisdict. (3. 13.) A. C. 413.

(181) L. 2. C. Just. de off. mil. jud. (1. 46.) A. C. 416.

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been inserted in the Theodosian Code. Justinian however adopted the second and third, and at first confirmed, indefinitely, (182) the jurisdiction of the military commanders, by a particular constitution; but, afterwards, introduced into Italy the restriction, in favour of the Privatus, contained in the last of these Laws. (183)

The Contentiosa Jurisdictio of the Magistrates and Defensors.

After this account of such of the public authorities as stand in near connection with our subject, we may proceed to speak of the mode of conducting the business, in so far as it has not been already explained. The judicial procedure, as was remarked at the very outset, (183 a) included the exercise of both kinds of jurisdiction—the Contentiosa and Voluntaria.

In the Italian and Provincial Cities.

The Contentiosa Jurisdictio was distributed, in the following manner. In the Italian and privileged Provincial cities, the magistrates regularly possessed the first instance; but, their judgments were subject to a right of appeal to the Governor. In the excepted cases, and in all others where the value was more than a certain, now unknown, sum, the Governor had the first instance. Until about the middle of the fourth century, the Go-

(182) L. 17. Cod. Just. de judiciis (3. 1.) A. C. 530.

(183) Sanctio pragmatica pro petitione Vigilii. C. 23. A. C. 554.

(183 a) See above, p. 28. 36.

vernor had also the first instance in the common Provincial cities; but, the Defensor, afterwards, possessed it to a similar extent with the magistrates in Italy. Originally, indeed, this jurisdiction of the Defensor was limited to a small sum, and left the Governor still in possession of extensive power. (184)

Included both the—extra ordinem form of Process, and the—Judex—Ordo Judiciorum.

The form of process depended, from the earliest times of the Republic, on the principle, that the magistrate prepared the case—applied the proper rules of law—and pronounced a conditional judgment. The facts were then remitted, for investigation, to a private person—Judex—who pronounced the absolute decree, in conformity with the instructions contained in the judgment of the Magistrate. This system was called—Ordo Judiciorum Privatorum; and, the magistrate was said to proceed—extra ordinem, when he did not take the assistance of a Judex. This was a settled principle, both in Rome and in the Chartered Cities; for, the Civic magistrates might appoint a Judex, in virtue of a power inherent in every jurisdiction. (185) In the times of the Emperors, certain lawsuits were, gradually, excepted from this

(184) In the Eastern Empire, the sum was raised by Justinian. See above, p. 65.

(185) Lex Galliæ Cisalpinæ, C. 20. Regarding the practice in the times of the classic Jurists, see above, p. 39, n. 48.

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arrangement, and the magistrate himself was required to decide these,—extraordinariæ cognitiones—without the assistance of a Judex. (186) Under Dioclesian, the Governors of the Provinces were, no longer, allowed the—Ordo Judiciorum; (187) and, they were required to decide all the suits themselves. In the event of excessive accumulation of business, they were, however, as an exception from the rule, allowed to revert to the Form, originally necessary in the great majority of cases, and to take the assistance of a Judex. But, this permission was, afterwards, granted to the Governors, in all insignificant matters. (188) It is extremely probable, that the Ordo Judiciorum was abolished, at the same time, in Rome and in the Chartered Cities. Justinian says expressly, that it no longer existed anywhere. (189) The regulations entitling the Governors to employ a Judex were never extended to the city magistrates. This, however, requires a more particular examination.

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(186) Digest. Lib. 50. Tit. 13. Ulpian, Paulus and Callistratus lived, in the reign of Alexander Severus. A. C. 222.—235.

(187) L. 2. C. J. de pedan. jud. (3. 3.) A. C. 294.

(188) L. 5. C. J. de pedan. jud. (3. 3.) A. C. 362. The same Constitution is contained, in several manuscripts of the Cod. Th.—ed. Ritter, T. 1. p. 46.

(189) § 8. J. de Interdictis (4. 15.) "quoties extra ordinem jus dicitur, qualia sunt hodie omnia judicia."

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Also, the right of having Assessors.

It is impossible to conceive, that two Prætors in Rome could overtake all the law business of the citizens and foreigners, without the assistance of the Judices. The same remark is true of every extensive jurisdiction. How could a governor or magistrate, singly, undergo such enormous labour? The permission granted by Dioclesian solves not this difficulty; for, it is conceded merely as an exception, and in such a manner, as plainly to imply, that, on common occasions, the Governor was able, without a Judex, to discharge all the public business. The difficulty is however removed, by means of another institution, which was adopted by the Emperors, and gradually introduced into all the other Courts. During the free Republic, the Prætors were attended by Advisers or Assessors, and their assistance was the more necessary, when the Prætors themselves were not jurists. The Emperors, in whom the whole business of the empire was concentrated, were very soon obliged to form a regular—Consistorium, or Auditorium—to which was intrusted every kind of business, and especially the decision of appeals. (190) This Imperial Consistory was imitated by the Governors. They, likewise, took the assistance of a body of Asses-

(190) See the valuable researches of Haubold—de consistorio principum, spec. 1. et 2 Lips. 1788. 1789. 4.

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sors. (191) From this time forward, the judicial business was conducted before the Assessors collectively; but, the decision depended entirely on the will of the Governor. Under this arrangement, the Judex, being unnecessary, was abolished. Now, if it be supposed, that the same desire of Reform, and of an improved Constitution, was felt by the functionaries of the Italian and Provincial cities, the example of the Governors, as it were, invited their imitation, and, thus, the Magistrate and Defensor also must have had recourse to the assistance of Assessors. The Magistrate, most probably, found these, among his ordinary assistants, the Decurions. In this manner, the Judices became in the cities also unnecessary: a fact, which cannot be accounted for, in the large Chartered cities, unless, by the introduction of Assessors, in their stead.

The Council gradually became a Court of Justice.

The Curia was thus, gradually, converted into a Court of Justice. Direct proofs of this change are not, it is true, to be found; but, this circumstance ought to raise no doubts regarding the fact itself, when we consider, how imperfect our sources of information are upon all subjects, regarding the jurisdiction of the city magistrates. The

(191) Tit. D. de officio assessorum (1. 22.) All from Jurists, in the reign of A. Severus; excepting Papinian, who died, A. C. 212.

share which the Decurions may be shown to have had in the Voluntaria Jurisdictio, serves also as a proof of their participation in the Contentiosa. The former was in some degree an innovation; but, both kinds always stood in an obvious connection. (191 a) It is, now, no longer difficult to explain, why the Defensors, after they received jurisdiction, came into close union with the Curia, from which, originally, they were so widely separated. The fact of this connection in later times is also certain, as will be immediately shown, when speaking of the Voluntaria Jurisdictio.

The Voluntaria Jurisdictio included two very different departments of business—the solemn Legis Actiones of the old Law, and the more recent Forms. The 'Actiones' were regarded, as a higher branch of Judicial procedure, and, to them belonged the Vindicia, with its whole train of applications, in Manumission, Adoption, and Emancipation. All the 'magistratus populi Romani' possessed the right of conducting these solemnities; but, not the city magistrates, unless it was bestowed upon them, as a special mark of distinction. (192) Probably, however, nei-

The Voluntaria Jurisdictio of the Magistrates did not include the—Legis Actiones.

(191 a) Regarding the jurisdiction of the Curia, see below, chap. 5. Text and n. 29.

(192) Paulus II. 25.—§. 4.—L. 4. C. de vindicta libertate (7. 1.)—L. 1. 6. C. de emanc. (8. 49.)—cf. L. 4. D. de adopt. (1. 7.)—and L. 1. C. eod. (8. 48.)

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ther this exclusion, nor the later restrictions regarding the Contensiosa Jurisdictio, applied to the old chartered cities. The Defensors had certainly no participation in these Actiones.

But, only the Gesta or Acta, e. g. in Donations, Testaments, &c.

The more recent Forms were introduced during the Imperial Government. (193) It became a common practice to record or engross, in a Protocol, every kind of business which came before the Judge—Acta or Gesta. In three cases, this was required by law:—in great donations—in the preparation of testaments—and, at the opening of them. A. Donations, above 200 Solidi, or 140*l.*, were not valid, according to the old Plebiscite—Lex Cincia, U. C. 550, unless followed by immediate Mancipation or Tradition: and, a naked promise, even when made in the form of a stipulation, was of no effect. Instead of this old form, it was ordained, probably by Constantine, that a Protocol of all the great Cincian donations should be extended, in presence of the Court; and, Justinian required the same solemnity, in all donations, above 500 Solidi, or 350*l.* (194)

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(193) Conradi, parerg. p. 439 seq., treats this subject very profoundly.

(194) L. 1. 8. C. Th. de spons. (3. 5.)—L. 1. 5. C. Th. de donat. (8. 12.) ibique J. Gothofred. See Savigny, on the Lex Cincia, in the Zeitschrift für gesch. Rechtswiss, B. 4. p. 17, 19. 31, &c., and Rudorf, de L. Cincia. Berol. 1825.

B. Written Testaments were made according to the old law, in one of two ways:—either, by the Civil Mancipation, with five witnesses, who signed and sealed,—or by the similarly sealed attestation of seven witnesses, according to the Edict. These are called Solemn Testaments. Under the Emperors, the custom grew up of avoiding these forms, by engrossing in a Protocol, in Court, the declaration of the last will. (195) Cujacius supposes, that the Solemn Testaments of both kinds, were also protocoled, for the sake of preservation. (196) If this account were really accurate, the practice might be considered, as the most probable origin of the Protocol testaments, and as an evidence of their having been introduced, when the old solemnities fell into desuetude. But, of that practice, mentioned by Cujacius,

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(195) The precise date of the commencement of this practice is uncertain. It is supposed to be already established, in L. 4. C. Th. de test. (4. 4.) A. C. 397. i. e. L. 18. C. J. eod. (6. 23), in L. 19. princ. eod., and Nov. Valent. T. 4. Const. 1. The introduction of it has been, improperly, attributed to L. 19. C. de test. (6. 23 :) for, this law only ordains, that the declaration may take place before the Emperor; since such must have been held to be no less solemn, than the protocol of the declaration made in the ordinary Courts,—a practice, valid long before.

(196) Cujac ad Paulum IV. 6. §. 1. Later authors are of the same opinion.

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no trace can be discovered, and its existence was indeed quite impossible. The protocol of Court, as we learn from many examples, was required to be a complete statement of the whole transaction. But, for this purpose, the Solemn Testaments must have been read through, which could be done only by breaking the seals, and by the annihilation of all the preceding solemnities. The Protocol Testament, on the contrary, has plainly arisen, out of the Nuncupative. (196 a) There were always seven persons, or more, present in the Curia, who might act as witnesses, and hear the whole contents of the testament read. A testament prepared, in this way, wanted no part of the old solemnities, excepting the Mancipation; which was supplied, by the interposition of the magistrate and the Curia. In the later part of the middle ages, when all precision in judicial matters was lost, this form, which was also applied to donations, must have been very convenient and useful. It superseded the necessity of attending to the subtile distinctions between testaments and codicils—last wills and dona-

(196 a) L. 8. §. 4. D. de B. P. sec. tab. (37. 11.) from Julian. A. C. 131.—L. 2. C eod. (6. 11.) A. C. 243. —Nov. Theodosii. Tit. 9. A. C. 439.—Nov. Valentiniani, Tit. 4. A. C. 446.

tions; for, it was always, in its external form, an uninterrupted and complete act. C. Finally, judicial interference was necessary at the opening of the Solemn testaments, which were all closed up by the seals of the witnesses. These testaments required to be brought to Court, at the latest, five days after the testator's death. There they were read—again sealed up—deposited in the Record-office for preservation, and—a protocol extended of the whole transaction. (197) These ceremonies, at the opening, were necessary only in the solemn testaments, and, consequently, in those only, which had not been already judicially sanctioned. Modern authors have, frequently, confounded with each other, the judicial declaration of the Last Will, and the judicial procedure regarding the Testament after the testator's death; although these solemnities had, really, nothing in common. (198) Besides the three cases, in which the

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(197) Paulus, IV. 6.—Digest. XXIX. 3.—Cod. Just. VI. 32—Savigny. Zeitschrift für Geschicht. Rechtswiss. B. I. p. 78. 95.

(198) The misapprehension of the phraseology may have particularly contributed to produce this error. We understand, by the publication of the Testament—the opening and the reading of it, after the Testator's death. But, the Romans called the declaration of the last will, which the Testator made to the Court—Publicatio; and, the pro-

judicial sanction was legally necessary, the parties might have had recourse to it, in a number of others: e. g. in Sale, Barter, Discharge, Tradition, &c. Its object, in all, was to preserve a memorial of the completed act, in an imperishable manner, at a time, when mere private deeds were easily lost or disavowed.

1 Magistrate, or Defensor—3 Principals, or Decurions—and the Exceptor, were required to be present at these Gesta.

These Gesta were competent before any Court; but, that of the Governor of the Province was, of course, to be preferred. (199) It was equally legal, however, and more convenient to proceed before the Curia of a city. According to a Constitution of Honorius, one Magistrate, three Principals, and the Exceptor, were required to be present. (200) And a Novelle of Valentinian III., states, (201) three Decurions, and the Ex-

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cedure, after the death—Recitatio. Still, however, the use of these terms is not accurately observed in the Constitutions. As proofs of our explanation of the phraseology, the reader may consult,—for Publicare, L. 18. 19. C. De test. (6. 23.),—and for Recitare, L. 6. D. test. quemadm. aper. (29. 3.) and Paulus, IV. 6. §. 1. 2.

(199) "Actis cujuscunque judicis." L. 19. C. de test. (6. 23.)

(200) L. 151. C. Th. de. decur. (12. 1.) A. C. 396. "Municipalia gesta non aliter fieri volumus, quam trium principalium praesentia, excepto magistratu et exceptore publico." Other manuscripts read "Curialium," in place of "Principalium."

(201) This is contained in Nov. Theod. Tit. 23. "In

ceptor, to be sufficient. The Principals are here, probably, synonymous with the Decurions. This supposition is supported, by the readings of several manuscripts, and, by the circumstance of the Ordinance in the Constitution being general; although, the Decemprimi, to whom otherwise the term Principales might refer, did not exist in a great many cities. (202) Valentinian's Novel seems to have been intended only to repeat and confirm the existing law; and, its author appears to have presumed, that the presence of the magistrate might be easily understood, from other circumstances, to be requisite, without being expressly commanded. These Gesta might be also completed before the Defensors. (203) This was competent, especially in the cities in which there were no magistrates, (204) and was subject to the same rules, as were applied to their Contentiosa Jurisdictio. In these

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municipalium confectione gestorum sit firmitas, si apud tres curiales publico fuerint exceptore perscripta."

(202) See above, p. 79.

(203) L. 9. §. 1. C. de defens. A. C. 409. (l. 55.)—Nov. 15.

(204) L. 8. C. Th. de don. (8. 12.) A. C. 415.—L. 30. C. J eod. (8. 54.) A. C. 459.—This explains why, in those Deeds in Marini, in which the Defensors occur along with the Magistrates, and take precedence of them, the whole business is conducted by the Magistrates alone. See above, p. 72. 84.

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cases, the Defensor occupied exactly the same situation with the Magistrate: and, thus, the presence of three Decurions along with the Defensor was unquestionably requisite. The laws are, indeed, silent on the subject; but, intrinsic reasons prove it; and, in the collections of forms used in the Frank Empire, the Defensor is always present at these Gesta, as the Director of the Curia. The Curator or Quinquennal appears to have had the same right with the magistrates; although, it is somewhat singular, that the Protocoling of Donations, originally competent before him, became afterwards illegal. (205) It may be proper here, on account of the connexion, to notice the law of the subsequent period. Justinian mentions, in general, the rights of the Magistrates and the Defensors, (206) without naming the Decurions and the Exceptor; but this probably arose, not because their presence was unnecessary, but, because, it might be considered, as tacitly implied.

Similar requisites of these Gesta among the East Goths.

The requisites of these Gesta in the Edict of the East Goth Theodoric, (207) merit

(205) See above, p. 45, and the Constitution, A. C. 415, in n. 76.

(206) L. 2. C. de Mag. Munic (1. 56.) Compare the passages referred to in Notes 203 and 204.

(207) Ed. Theoderici, art. 52. 53., A. C. 500. See above, p. 11.

our attention. At the donation of Land, there were required " tres curiales, *aut* magistratus, aut pro magistratu defensor civitatis cum tribus curialibus, aut duumviri, *vel* quinquennalis." This passage is confused, and without meaning, and must be read thus: " tres curiales *et* magistratus, aut pro magistratu defensor civitatis cum tribus curialibus, aut *duumviri quinquennales.*" The three Decurions must be again tacitly understood after these last words. The passage now agrees, completely, with the law at that time existing; although, it is the first proof of the renewed competency of the Quinquennals in the protocoling of donations. In tradition, the form is somewhat less strict. Thus, " si magistratus, defensor *duumviri aut quinquennalis* forte defuerint . . . . tres sufficiant curiales:" but, this passage must be also amended: thus, " si magistratus defensor *aut duumviri quinquennales* forte defuerint."

And in Italy, and the Frank Empire, after the dissolution of the Roman power.

There are many examples, still remaining, of the form of these Gesta, in the period following the dissolution of the Empire. Regarding Italy, these are found in Marini's Deeds; and the Frankish form-books show the practice in Gaul. The author of the procedure always appears personally; and, the whole protocol is a sort of dialogue between him and the presiding Magistrate

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or Defensor. (207 a) This was sufficient, in an unilateral act: e. g. in the making and opening of a testament, and in the preparation of an authenticated copy of a previous protocol. But, in contracts, the approbation of the other party also was required. Often, both appeared in Court; and, at other times, one of the contracting parties sent merely a written statement of his consent. On many occasions, persons were deputed, by the Court, to go and ask the parties, regarding their consent, and the genuineness of their subscriptions; and the deputation, on their return, made an oral report. In traditions of distant estates, this deputation was often obliged to perform a long journey; e. g. on one occasion, from Syracuse to the estates which Odoacer had donated. (208)—In Deeds and Gesta, it was necessary, under Justinian, to specify, at the beginning—the year of the Emperor's reign—the Consulship—the month and day of the Revenue Indiction: and, when the parties could not write, the presence of a notary, along with five witnesses, was likewise requisite. (209)

(207 a) See Cujac. ad Paulum, IV. 6. §. 1., or Marculf. Form. ii. §. 37. 38. and notes in Canc. ii. 241.

(208) Marini Papiri Diplomatici. N. 82. 83.

(209) Nov. 47. C. 1.—Nov. 73. C. 8.—Conradi parerg. p. 451 460.

CHAPTER III.

LAW-SOURCES OF THE NEW GERMAN KINGDOMS AFTER THE CONQUEST.

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The Germans and Romans, after the Conquest, lived under their separate laws.

When the Goths, Burgundians, Franks and Lombards, founded kingdoms in the countries, formerly subject to the power of Rome, there were two different modes of treating the conquered race. They might be extirpated, by destroying or enslaving the freemen; or, the conquering nations, for the sake of increasing their own numbers, might transform the Romans into Germans, by forcing on them their manners, constitution and laws. Neither mode, however, was followed; for, although many Romans were slain, expatriated, or enslaved, this was only the lot of individuals, and not the systematic treatment of the nation. Both races, on the contrary, lived together, and preserved their separate manners and laws. From this state of society, arose that condition of civil rights, denominated Personal rights, or Personal laws, in opposition to Territorial laws. The mo-

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derns always assume, that the law, to which the individual owes obedience, is that of the country, where he lives; and, that the property and contracts of every resident, are regulated by the law of his domicile. In this theory, the distinction between native and foreigner is overlooked, and national descent is entirely disregarded. Not so, however, in the middle ages; where, in the same country, and often indeed in the same city, the Lombard lived under the Lombardic, and the Roman under the Roman law. The same distinction of laws was also applicable to the different races of Germans. The Frank, Burgundian and Goth, resided in the same place, each under his own law; as is forcibly stated, by the Bishop Agobardus, in an Epistle to Louis le Debonnaire. (1) "It often happens," says he, "that five men, each under a different law, may be found walking or sitting together."

The East-Goths, alone, did not admit the system of Personal Laws.

In the East-Gothic kingdom alone, this custom was not originally followed. There, an artificial and systematic plan was adopted, which belongs to the particular history of that nation, and cannot be brought within the general inquiry. All the other States followed the system of Personal laws: and, this

(1) Agobardi ep. ad Lud. P. in Bouquet, T. 6. p. 356. D Paris 1749.

universal practice could not have arisen from accidental reasons, but from common views, principles, and wants. These may be appropriately illustrated, at present.

And that system did not, originally, exist among the Germans.

According to the general opinion, the system of personal laws prevailed among all the German nations, from the earliest times; (2) and, it is customary to explain this circumstance by the love of freedom, so peculiar to these races. In the first place, however, it is difficult to perceive, how such an institution could arise merely from regard to liberty. Such an attachment might, indeed, create a wish among nations, or individuals to preserve their own laws, in a foreign country, or under a foreign yoke: but, the question is, how were the predominant people induced to grant them this privilege? The benevolent and hospitable disposition of the victorious may have been partly the cause; but, their mere love of freedom affords no satisfactory explanation. This humane treatment of foreigners was not deeply seated, in the character of the old Germans. It is probable, that among them every foreigner was, at first, a Wildfang, and belonged to

(2) Montesquieu, XXVIII. 2. and many German authors are of this opinion. In confirmation of our theory, the reader may consult—Rogge. Gerichtswesen der Germanen. Halle, 1820, S. 53.

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the class of the Biesterfreien;—denied the advantages, arising from service in the national army, or from the obligations of fealty, and living as an alien, unprotected by any power, except the weak hand of the general government; who, while they excluded him from the rights of marriage, inherited his property, and exacted his composition, if slain. (3) Further, the want of such an institution as the Personal Laws, could never have been felt, in a country without trade, and where few foreigners resided. In these circumstances, its introduction was impossible. If only a single Goth lived in the Burgundian Empire, none of his countrymen could be found to administer Gothic Law, and the Burgundians themselves were entirely ignorant of it.

But arose from the Condition of the Victors and Vanquished after the Conquest.

The truth is, that the want of such an institution, and the possibility of introducing it, could occur only after the nations were blended together in considerable masses. The internal condition of each kingdom would then produce what could never have been brought about, by mere benevolence towards individual foreigners. According to this account of the origin of the system of Personal laws, it prevailed, in all the German States, settled in countries, formerly subject

(3) Möser Osnabr. Gesch. Th. I. Abschn. I. §. 41.

to Rome. At first, the validity of two Laws only was admitted: e. g. the Law of the victorious race, and of the vanquished Romans. Individuals, belonging to other German nations, did not at first enjoy the right of living under their own laws; but, when our supposed kingdom had extended its conquests, and spread out its dominion over other German tribes, then the laws of the conquered German races were acknowledged, in the same manner as the Roman formerly had been. Thus, also, every foreign law, prevailing in the empire of the Conqueror, was admitted and considered as valid among all the vanquished. This practice ought to have produced the following results. At first, in the northern parts of France, the Frank and Roman laws must have been exclusively received: and, under the Carlovingian dynasty, it would become necessary to admit likewise the laws of the West Goths, Burgundians, Alemans, Bavarians, and Saxons: because, these as nations, belonged to the empire. Italy, however, did not form a Province under the Franks, and there could not consequently be the same reason for admitting the validity of Lombardic Law, within the Frank empire. In Italy, also, under the Lombardic Kings, only Lombardic and Roman law could have prevailed to the exclusion of every other; but, after its conquest by the Franks,

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all the multifarious foreign laws, existing in the territory of the conquerors, must have been introduced. Now, these anticipated results are supported by history: and this accordance is a strong practical confirmation of that account of the origin of Personal Laws, already established by general reasoning.

Among the Franks, the Personal Laws became numerous; although at first, they included only the Salic and the Roman.

Let us now examine the proofs of this theory in France. In the Salic Law, confessedly the oldest, in its present form, of all the existing collections, (4) the composition for the slain, although varying much in its amount, is exclusively applied to the two grand divisions of the inhabitants of the country—the Romans and the Franks; including, under the last name, all the other Germans. The law declares: (5) si quis ingenuus Francum, aut hominem barbarum occiderit, qui lege Salica vivit, VIII M. den. qui faciunt sol. CC. culp. jud..... Si quis Romanum hominem, convivam regis, occideret, etc. The proper explanation

(4) Eichhorn deutsche Rechtsgesch. Th. 1. §. 35. 143.

(5) Lex Salica emend. Tit. 43. §. 1. 6. Canc. ii. 143.—Likewise, in Baluze, and in Georgisch. Verbatim the same, in the Parisian MS. tit. 68, in Canc. 5. 387: and, without any substantial difference, in the Wolfenbüttel MS. tit. 40, in Canc. 5. 401. (from Eccard.) "Si quis ingenuus Franco aut barbarum, qui legem Salicam vivit, occideret," etc.

of this passage is: "If a freeman killed either a Frank or any other German, for all the other German races lived according to the Salic law," &c. (6) There occurs, no doubt, in the other text of the Salic law, known under the name of "Lex Salici antiquior," or "Pactus legis Salicae," the following very different reading: (7) Si quis ingenuus Franco, aut Barbarum, aut hominem qui Salica lege vivit, occiderit, etc. In this passage, three classes are introduced:—Franks —other Germans, and—those Romans, who had chosen to live, under the Salic law. (8) There is, consequently, no apparent trace of the doctrine which we might wish the passage to prove,—that all foreign Germans lived according to the Salic law. This explanation, however, and the reading on which it depends, must stand or fall with that free choice of the law of which we shall speak below. (8 a) But, it may suffice to state at present, that the first reading is plainly to be prefer-

(6) Barbarus may be also understood to apply to those Germans, who only occasionally, and as Individuals, lived under the Salic law;—or, according to Eichhorn's supposition, to the Freedman called—Homo denarialis.

(7) Pactus L. Sal. Tit. 44. §. 1. in Georgisch, p. 89. or Canc. ii. 81.

(8) Eichhorn deutsche Rechtsgesch. Th. 1. §. 46. Here, however, the term may be again applied to the—Homo denarialis.

(8 a) See below, p. 137.

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red: because, the text to which it belongs is generally the purest; (9) and because, in another passage, the Franks alone, and none of the other German tribes, are distinguished from the Romans. (10) Our assertion, therefore, regarding the original and simple form of the practice in France, may be considered as proved. The existence of various Personal laws in a subsequent period is equally undeniable, and shall be afterwards more fully explained. Indeed, the later compilation of the Ripuarian law is proved from its express admission of the Salic, Burgundian and Alemanic law; (11) even, if all the other reasons, in support of that date, were disregarded. (12) In perfect accordance with its more recent origin, the Ripuarian collection admits a difference quite unknown to the Salic law, and requires a larger composition for the Franks than for the foreign Germans. (13)

The Personal Laws, in Italy, among the Lombards, underwent the same change.

In Italy, likewise, the practice underwent the same change. While the power of the

(9) Wiarda. Geschichte des Salischen Gesetzes. §. 19—22.

(10) L. Sal. emend. T. 15. §. 2. 3. Si Romanus homo Francum expoliaverit ..... Si vero Francus Romanum expoliaverit. Canc. ii. 131..... Here the difference of the other Text (tit. 16. §. 2. 3.) is not important: Si vero Romanus, Barbarus, Salecum Francum expoliaverit .... Si vero Francus Romanum expoliaverit .... Canc. ii. 43.

(11) L. Ripuar. Tit. 31. §. 3. 4. Canc. ii. 305.

(12) Eichhorn deutsche Rechtsgesch Th. 1. §. 38. 143.

(13) L. Ripuar. Tit. 36. §. 1. 2. 4. Canc. ii. 306.

Lombardic Kings endured, the Notaries were enjoined to prepare all Deeds, according to the Lombardic or Roman Laws. The use of every other law was prohibited, under a certain penalty. (14) All foreigners, i. e. all Germans who were not Lombards, were constrained to live, under the Lombardic law: unless, the privilege of retaining their own had been granted to them, by the particular favour of the King. (15) In precise confor-

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(14) L. Liutprandi, VI. 37. De scribis hoc prospeximus, ut qui chartam scripserit, sive ad legem Langobardorum, quae aptissima (al. quoniam apertissima) et pene omnibus nota est, sive ad legem Romanorum, non aliter faciant, nisi quomodo in illis legibus continetur. Nam contra Langobardorum legem, aut Romanorum non scribant etc. Canc. i. 121.

(15) L. Rotharis. 390. Omnes gargangi (al. guargangi, warengangi), qui de exteris finibus in regni nostri finibus advenerint, seque sub scuto potestatis nostrae subdiderint, legibus nostris Langobardorum vivere debeant, nisi legem suam a pietate nostra meruerint, etc. Canc. i. 97. The Wargengi occur also in Capit. III. a. 813. C. 8; Baluz. i. 511. and they are there, as here, foreigners, and not as Muratori, among others, supposes—Vagabonds or Banished persons. These ideas are, however, somewhat akin; and Vargi, Wargi, Warengangi sometimes signify those under sentence of banishment, and sometimes Vagabonds. L. Sal. emend. T. 57. §. 5. L. Ripuar. T. 85. §. 2. Capit. Radelchisi. §. 12. (Canc. i. 271.) Sidonius Apollinaris. lib. vi. epist. 4. Compare the notes of Savaron on this passage; (Ed. Paris. 1609. in 4.) where much is adduced, from the old Glossaries.

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mity with this rule, we find, in a Placitum or Court of the first half of the 8th century, Lombardic law, applied to the case of Lombardic parties, although several of the Schöffen or Judges were Alemans. (16) These Alemans had, in fact, become Lombards, by the mere act of residing in the Lombardic territories. Such was the original state of the Personal laws in Italy; and, how the other German Laws found, subsequently, their admission into that country, shall be afterwards shown.

As long as this simple rule was followed, the Roman law was, strictly speaking, the only personal one; since, the law of the victorious German race, from the manner in which it had been forced upon the foreign Germans, became, in reality, a territorial law. (17)

Multiplicity of Personal Laws.

We may now proceed to illustrate the condition of this practice, in those subse-

(16) This very remarkable deed, prepared between A. C. 721 and 744, is in Fumagalli,—cod. dipl. Num. 4. p. 18.; and is excellently explained by him, in another place (antichita Long. Milan. Vol. I. p. 291.) It plainly contains Lombardic law; for, it refers to the—Edectum of Domnus Luitprand; and the subscription is as follows: hec nostrum judicatum emisemus ivi mecum stante idoneis homenis Toto de Geperanzo Leonace et Placemunus Austremunus Gumipert et Alto alamanni.

(17) Wiarda, Geschichte des Salischen Gesetzes, S. 132. 133.—gives this correct doctrine, a different, and not quite accurate, application.

quent times, when many of the German races maintained their own laws. In the course of this investigation, however, care must be taken not to lose sight of the continued validity of the Roman Law—the principal object of this work. It would be improper, at present, to extend our inquiries beyond the general authorities and laws: for, the deeds, involving Roman Law questions, belong to the particular history of the different countries, to which our present general researches are intended to be only preparatory.

The Roman was a Personal Law among the West Goths.

While the West Gothic kingdom included a great part of France, the most decisive proofs of the continued endurance of the Roman law are found in the Breviarium; which, in fact, owes its existence to that circumstance: for, the Breviarium could not have preserved so many Roman Law doctrines, if these had not been current, among the West Gothic Romans at the date of its compilation. The account of the subsequently dismembered provinces appertains to the history of the Franks. In the West Gothic Empire itself, the Roman law was indeed subsequently, abolished: but, since that change produced no effect, as a general measure, it shall be noticed, in the particular history of Spain. (17 a)

(17 a) See below, chap. viii. n. 96.; & chap. ix. n. 55.

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Burgundians.

In the Burgundian Collection, the validity of the Roman law, along with the Burgundian, is expressly avowed. (18) That a particular system of the Roman Law had been prepared among the Burgundians, shall be proved in their separate history; and, their subsequent condition depended on the Franks, with whose Empire they became incorporated.

Franks.

The first distinct evidence of the uninterrupted continuance of the Roman law, among the Franks, is the Constitution of Chlotaire I., about A. C. 560. In it, this validity is both generally acknowledged, and particularly applied. (19) A strong proof of the extension of the principle of the Personal laws is found

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(18) L. Burgund. Prolog. (Canc. iv. 13. med.) "Inter Romanos . . . Romanis legibus praecipimus judicari." Tit. 55. §. 2. "... jubemus .. causam Romanis legibus terminari ..... licebit ei seu pulsatus fuerit, seu ipse pulsaverit, Romano jure contendere." Canc. iv. 30. See below. Chap. vii. princ.

(19) Const. Chlotarii (Baluz. T. 1. p. 7. Georgisch. p. 465) Cap. 4. "Inter Romanos negotia causarum Romanis legibus praecipimus terminari." In Cap. 13., the property of the church and of Romans is declared secure, by the 30 years Prescription; and, the Constitution concludes thus:— nec quicquam aliud agere aut judicare quam ut haec praeceptio secundum legum Romanarum seriem continet... praesumant." See below. Chap. ix. n. 37.

in Marculf, about A. C. 660; where, in an instruction to a Dux, Patricius, or Comes, it is said—that Franks, Romans, Burgundians, and other nations shall be judged by their own laws. (20) Likewise, in several Frank Capitularies of Charlemagne, the validity of the Roman and other laws is expressly declared. (21) Similar notices occur in the Capitularies of Louis de Debonnaire. (22) Some Manuscripts of the Breviarium in the reign of Charlemagne contain an explicit confirmation of that work. (23) The following passage of the Decretals has been considered as a similar sanction of the Breviarium: —" quod Theodosius statuit imp. et Carolus

(20) Marculfi form. I. 8. " et omnis populus ibidem commanentes, tam Franci, Romani, Burgundiones, quam reliquas nationes sub tuo regimine et gubernatione degant et moderentur, et eos recto tramite secundum legem et consuetudinem eorum regas." Canc. ii. 194. See below, chap. ii. n. 20.

(21) Capit. 6. a. 803. art. 2. (Georgisch. p. 675. Baluz. I. p. 401) " lege Romanam legem, et sicut ibi inveneris, exinde facias. Si autem ad Salicam pertinet legem" etc. — Capit. 2. a. 813. (Georgisch, p. 775. Baluz. I. 505) " Karolus . . . constituit ex lege Salica, Romana atque Gundobada."

(22) Ludovici P. divisio imp. a. 817. art. 9. (Baluz. I. 576) " Proprium autem suum . . . secundum suam legem unusquisque absque injusta inquietudine possideat." — cf. Capit. 1. a. 819. art. 4. 9. & Capit. 2. a. 819. art. 8. (Georgisch p. 838. 839. 848., or Baluz. i. 600. 606.)

(23) See below, Chap. 8.

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innovavit." (24) The Breviarium, however, is not the subject of this quotation; but, a spurious Constitution of the Theodosian Code, which had been admitted, among the Capitularies. (25) It affords, therefore, no evidence of the general validity of the Roman Law. The Epistle to Louis le Debonnaire, (25 a) is another indication of the variety of the existing laws. Afterwards, A. C. 858, the following passage occurs, in the Coronation oath "unicuique competen-

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(24) Decret. Greg. Cap. 13. X. de jud. (Lib. ii. Tit 1.) See Böhmer's Ed. of the Corpus. Jur. Can.

(25) L. I. C. Th. de episc. jud. (xvi. 12.) contained in Capit. lib. 6. C. 366. (Baluz. 1. 985.) The Pope does not appear to have quoted from the original authority, but only from Gratian, in whose work it is inserted. Decreti Pars secunda. Causa xi. Quæst. 1. Cap. 35. 37.—The passage of the Capitularies contains also a fuller enumeration of the different nations than is found any where else, and expressly acknowledges their different laws. But, the genuineness of the whole passage appears questionable: partly, because it is contained only in the doubtful collection of Benedictus Levita, from which all the later authors have copied it; and, partly, because it mentions the Lombards and the inhabitants of Benevento among the other nations, and as the subjects of the same empire. Its authenticity may perhaps be saved by supposing, that the last mentioned statement refers to individual Lombards or Beneventines, residing in France.

(25 a) See above, p. 100.

tem legem et justitiam servabo." (26) The Edictum Pistense, the most remarkable of the Capitularies, in proof of the continued endurance of the Roman Law, shall be immediately noticed. The Capitularies, from which all the preceding proofs are taken, contain many instances of the preservation of the Gothic law (27); but the Ripuarian Collection acknowledges the validity of the Personal laws in general, and of the Roman Law, for the Romans, in particular. (28) A passage in Eginhard, mentioning two systems of Laws among the Franks, has been erroneously considered, as a proof of the existence of the Roman Law. Eginhard, however, does not there mean the Roman and Frank, but the Salic and Ripuarian Laws. (29) The passage in the Capitularies, abrogating the Roman Law, is altogether spurious: (30) although, this can only be proved, in the

(26) Baluz. II. p. 101.

(27) Cap. a. 844. art. 3. (Baluz. II. p. 27). Capit. a. 878, or Synodus Tricassina. (Baluz. II. p. 277).

(28) L. Ripuar. Tit. 31. §. 3. 4.—Tit. 58. §. 11.—Tit. 66. §. 1. 2.—Tit. 87. (Canc. vol. ii.)

(29) Eginhardi vita Caroli M. Cap. 29 princ. (Bouquet T. 5. p. 100) "nam Franci duas habent leges plurimis in locis valde diversas." This passage is properly explained by several authors, and, among others, by Bouquet in his note c.: but Ritter, proleg. Cod. Theod. p. CCXXVII. not. c, understands it as referring to the Roman Law.

(30) Capit. lib. 6. C. 343. Baluz. i. 981.

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And Lombards.

particular history of the West Gothic Law.

In the Lombardic kingdom, there are many Laws of similar import, with those of the Franks. Liutprand's declaration of the exclusive validity of the Lombardic and Roman Laws, has been already noticed. (30 a) The Carlovingian government introduced the other laws into Italy. In the Ordinances both of Charles and of Pipin, the Franks and Allemans, as well as the Lombards, are allowed their own laws: (31) although, the Lombards and Romans, no doubt, preponderated from their numbers. (32) In other enactments, the principle of the Personal Laws is generally expressed. (33) Most light is thrown, on the condition of the law in Italy, by deeds, which prove the existence, in that country,

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(30 a) See p. 106. n. 14.

(31) L. Long. Caroli M. 89. (Canc. i. 160.) Pipini 8. and 43. Canc. i. 175. & 180.

(32) L. Long. Caroli M. 157. med. (Canc. i. 170., or prolog. Capit. a. 801. Baluz. I. p. 345.) "pleraque statuta recitata ex Romana, seu Langobardica lege competenti sententia terminata sunt." This passage does not prove the exclusive validity of these two laws. See also L. Pipini, 46.

(33) Capit. Pipini a. 793. art. 37. (Baluz. I. p. 542.) "Domno Regi dictum est quod multi se complangunt legem non habere conservatam, et quia omnino voluntas Domni Regis est ut unusquisque homo suam legem pleniter habeat conservatam .... Et per singulos inquirant qualem habeant legem ex nomine. cf. L. Long. Lud. Pii. 1. (Canc. i. 182.) L. Lotharii sen. 14. (Canc. i. 196.)

of a much greater number of Nations and of Laws, than in France.

"Lex Salica" signifies—the Law of the Salic Franks, generally.

In nearly all the ordinances, already quoted, the term—Lex is applied to that Law which it is intended to acknowledge; e. g. Lex Salica—Lex Romana, &c. The same use of the term occurs in Deeds, containing the real application of these laws to particular cases: and hence, it is very important to have a clear and accurate idea of the meaning of—Lex. The first part of the inquiry relates to its signification, when applied to any of the German Laws; e. g. Lex Salica. Many modern authors connect this term, with the printed compilation, which we possess, both separately and in collections, under that name. But, a more mature consideration of the subject shows, that the true meaning of the expression must be—the whole subsisting Law of such a people as the Salic Franks, and that the text of our printed copies, as a mere abridgement of that national Law, often passes by its most important branches. (34) The books of written laws are by no means excluded, when the question refers to the Lex of a nation: because, as their name imports,

(34) Wiarda (Geschichte des Salischen Gesetzes, S. 124. 140.) destroys this correct opinion, by the adoption of other erroneous views, as shall be afterwards shown.

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they undoubtedly contain a part of the general law. In these cases, Lex does not signify any particular Law, but the whole body of legal and political rights.

And "Lex Romana" —the Roman Law generally.

The same question must be answered regarding the signification of Lex Romana; and, this inquiry is of more importance to our subject, than the former. If we follow the analogy of the German Leges, Lex Romana must signify Roman law. On the other hand, if every written text of the Roman law be called—Lex Romana, and the term be also applied to the different compilations, e. g. the Justinian, or the Breviarium; then, the sense, in which the author uses the expression, must depend, upon the circumstance of his having been acquainted with the former, or the latter of these Collections: although this rule is not absolute; since, every term is subject to a capricious use. It has been very frequently maintained, even by the most learned men, that "Lex Romana" means the Breviarium, and never bears any other signification. Brenkmann gives his reader the additional warning, to be very careful not to extend the expression "imprudenter" to the Justinian Collections. (35) The im-

(35) Ducange, v. lex Romana T. 4. p. 155. ed. Bened. —Brenkmann hist. Pandect. p. 55.—Ej. append. ad Relandi fastos p. 859.—Ritter praefat. Tom. 2. Cod. Theod. par. penult.

portance of accuracy on this point must be apparent to every one; for, if Brenkmann be right, every passage, where Lex Romana occurs, would prove the knowledge and use of the Breviarium; even although, other reasons might induce the belief, that the Justinian law was meant. This interpretation of the term would also show, that the Breviarum alone was known in Italy, since Charlemagne. The opinion, however, rests on a remarkably frail foundation. It is said, that the Breviarium, in several manuscripts, bears the name—Lex Romana. Now, the supposition is not at all proved by that circumstance; for, we admit, that the Breviarium is a Lex Romana, and argue against its exclusive right only to that appellation. Our opinion, on the other hand, may be considered as established, by the very futility of this reason, and by mere analogy, without any positive proof; although, more evidence may be produced upon this subject, than upon almost any other disputed point of the middle ages. In the following passages, Lex Romana clearly does not signify the Breviarium. The oldest of these is in the Papian. The author of that work had not the Breviarium before him, and consulted the very sources from which it had been compiled. He applies Lex Romana to no particular collection of Roman law, but to

the Roman law in general. (36) Next to the author follow the Transcribers of the Papian. In the oldest MS., the Ottobonian, Lex Romana occurs twice in the beginning, and once in the end, as the title of the work itself; although, it bears no resemblance to the Breviarium. (37) These facts show the danger of preconceived opinions. Brenkmann allowed himself to be so totally misled, by this last use of Lex Romana, as to maintain that the MS. itself was a Breviarium; although, it lay before him, and the slightest inspection might have convinced him of the contrary. (38) Louis le Debonnaire ordained, that the Emphyteusis prejudicial to the Church, should be null, in conformity with the Lex Romana: and, the rule, thus referred to, is found, not in the Breviarium, but in the Novelles of Justinian. (39) In the same

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(36) Papiani respons. Tit. 2. med. "de pretio occisorum nihil evidenter lex Romana constituit." The editions of the Papian are mentioned below, chap. vii. Part 2. at the beginning.

(37) Amaduzzi leges, Nov. praef. p. LI. See below, chap. 7.

(38) Brenkmann, hist. Pand. p. 55.—Ej. append. ad Relandi fastos consulares, p. 859.

(39) L. Long. Lud. Pii 55: (Canc. i. 193.) "ut emphyteuseos contractus unde ecclesia damnum patitur non ob-

manner, in a Burgundian Capitulary of Charles the Bald, A. C. 865, the excambion of church lands is united with certain forms of the Lex Romana; and, these forms are found in the Novelles. (40) In the decree of the Synod of Troyes, A. C. 878, which appears also as a Capitulary of Louis the Second, (41) the Justinian law is expressly denoted, by the term—Leges Romanæ. In the remarkable unprinted collection of Canon law, composed in Italy, towards the end of the ninth century, and dedicated to Archbishop Anselm of Milan, the Novelles are frequently called—Novella Lex Romana, or—Novella Legis Romanæ: (42) and, a series of extracts, from the Institutes and Code, is entitled—Capita Legis Romanæ. About the middle of the tenth century, Atto, Bishop of Vercelli, calls the Codex, a part of the Lex

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serventur, sed secundum legem Romanam destruantur." This is taken from—Nov. 120. C. 8. or more probably from—Julian. Const. cxi. C. 4. or Const. vii. 3. med.

(40) Cap. a. 865. art. 6. (Baluz. II. p. 198) "signatis ipsis praeceptis sicut lex Romana praecipit." The Sources, —Julian Const. 7. C. 2. and Const. 48. C. 2.—have been rather unmeaningly blended together, as shall be afterwards shown.

(41) Cap. a. 878. (Baluz. II. p. 277) "inspectis legibus Romanis . . . invenimus ibi a Justiniano Imp. legem . . constitutam." See below, chap. xv. n. 12.

(42) See below, chap. 15. n. 32, &c.

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Romana. (43) In a Roman Placitum of Otto the Third, A. C. 999, the Lex Romana is mentioned, and immediately thereafter the Justinian Law is quoted. (44) Cotemporary with this Placitum, are the Lombardic Quæstiones ac Monita: where, the intestate order of succession of the Novelle 118, is entitled—" Supercessio (instead of Successio) Lege Romana ; " and, in the text itself, the following words are used. " Sic praecipit Lex Romana in libro qui nominatur Novella quem egit Justinianus Imp. temporibus suis. " In the same manner, the Justinian Law is called the Storehouse of the Lex Romana, and afterwards follow these words. " Dicitur in lege Romana, in libro qui nominatur Instituta, " etc. (45) The title of " Petri exceptiones legum Romanorum, " which contain exclusively Justinian Law, is another proof the same use of the term. (46)

(43) Attonis epist. ad Azonem episc. (D'Achery. Spicil. 4to. Ed. T. 8. p. 115. med.: or, fol. Ed. T. 1. p. 435. 436) : " legitur etiam in libro Codicum, quod est Romanae legis, ita : Nihil aliud sic inducere potest, " etc. The passage may be found in—L. 26. in f. C. de nupt. (5. 4.)

(44) Mabillon Annal. Benedict. T. 4. p. 129. infr. " Sicut lex praecipit Romana : " and, afterwards, p. 130. med., " quia Justinianus Imp. praecepit. "

(45) Muratori Script. It. T. 1. P. 2. p. 163—165. Canc. i. 221, sq. See below, chap. 14.

(46) See below, chap. 9.

Lex Romana signifies also Justinian Law in two deeds by Louis le Debonnaire, and in an Epistle of Pope John VIII. (46 a.) Even so late as A. C. 1160, the expression Lex Romana is used, in the preface to the Statutes of Pisa, which contain only Justinian Law. (47)

"Lex Romana" is applied also to the Laws of the Frank and Italian Emperors.

According to some authorities it might be maintained, that the ordinances of the Frank and Italian Emperors bore the name of Lex Romana. Thus, in a Modena MS. the term is applied to a Constitution of Lothaire I., (48) and, a Paris MS. contains the words—"Item ex legibus Romanis a Domno Lamberto Imp. promulgatus, Cap. XI." (49) The occurrence of the expression, in both these passages, may have been owing, however, to the imperial dignity of the legislator; or, the first may be understood to refer to a law promulgated in Rome: while the second belongs to the Acts of the Church Council of Ravenna, A. C. 904, and may therefore be explained, in reference to the Romish Church; for, its Decrees were merely promulgated by the Emperor. Still, these

(46 a) See below, chap. 9. n. 78. 81. & Chap. 15. n. 15.

(47) Valsechius de vet. Pisanae civit. constitutis (Hoffmann hist. j. Vol. 1. P. 2. p. 193 med.) "Pisana itaque civitas a multis retro temporibus vivendo lege Romana retentis quibusdam de lege Longobarda," etc.

(48) Canc. 5. 11. med.

(49) Baluz. capit. praef. §. 18. med.

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are particular and unusual applications of the term. The true and constant meaning of Lex Romana is Roman Law, in whatever form it may appear, and from whatever source it may be derived.

"Lex Mundana" may signify, any of the Personal or National Laws.

The expression, Lex Mundana, has also been understood by some, to mean the Roman Law, and exclusively the Breviarium; although, it truly denotes all the Personal or National Laws, in opposition both to the —Canon Law, Leges Ecclesiasticae, (50) and to the—Capitularies, or imperial ordinances of the Franks. In this sense, the Edictum Pistense of Charles the Bald discriminates, between the—Leges Mundanas—Ecclesiasticas, and the—Capitula avi vel patris nostri et nostra. (51) The Roman Law is, undoubtedly, a Lex Mundana: but, so is the West Gothic, (52) and every other national law.

Thus far, concerning the general fact of the coexistence of many Personal laws; and we are now prepared to illustrate the application of their principles—first, to individuals; and, afterwards, to particular Law questions.

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(50) Ducange confines his remarks too much, to this single distinction: See v. lex Mundana, T. 4. p. 154, ed. Bened.; where, many authorities are collected.

(51) Ed. Pistense, a. 869. art. 3. 4. 5. (Baluz. II. p. 209. 210. 211.)

(52.) Capit. Ludov. II. a 878. fin. (Baluz. II. p. 278.)

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A. The Personal Law doctrines applied to Individuals.

Regarding their application to individuals, to which also the Professio of the Lex in Deeds belongs, the principal author is Lupi: (53) and he has so completely exposed the prevailing errors of his precursors, that we may confine ourselves, in a great measure, to the illustration of his reasons, and to the exposure of some of his mistakes or omissions. On this subject, the following are the general principles. Regularly, every person lived, according to the law of the nation, from which he was descended, by the father. The exceptions to this rule are:—married women, who followed the law of their husband—the whole Ecclesiastical body, who were regulated by the Roman Law—and the freedmen, among several nations. Such deviations were considered as privileges, and not as obligations; and, it was often thought more advisable to adhere to the paternal law, than to take advantage of a change. These doctrines may now be separately examined.

The law of the father, at their birth, was the law of the children.

As proofs, that birth was the first and most general principle, in determining the law of each individual, we may refer to the numerous ordinances, in which, Romans, Lombards,

(53) Lupi Codex diplom. Bergom. Diss. 4. p. 213–232. Formerly, the only guide was—Muratori antiqu. T. 2. diss. 22. and Script. Ital. T. 1. P. 2. praef.

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Franks, &c. are distinguished. The separate mention of these nations referred to the law of descent; and the law of the individual followed, as it were, by necessary implication, from the national names. In the Burgundian, Frank, (54) and Lombardic collections, the custom prevailed of merely giving the name of the nation, when in fact the personal law of the individual was meant. One example of this, from the last mentioned laws, may suffice: (55) Sicut consuetudo nostra est, ut Longobardus, aut Romanus, si evenerit, quod caussam inter se habeant observamus, ut Romani successiones juxta illorum legem habeant, etc. To regulate descent by the father, and not by the mother, is natural; especially, when we recollect, that the mother herself, according to the rule, took the law of her father or husband. This is expressly stated to be the case, in the Lombardic laws. (56) Children, born out of wedlock, as they had no father, (57) were at li-

(54) The most important passages have been already given, in notes 18. 19. 20.

(55) L. Pipini. 46. The other authorities are, L. Long. Liutpr. IV. 1.—Caroli, M. 89.—Pipini, 8. 43.—Lotharii, sen. 14. (Canc. vol. 1.)

(56) L. Liutprand. VI. 74. (Canc. i. 130.)

(57) Quaestiones ac monita. (Canc. i. 224. fin.): "Justum est, ut homo de adulterio natus vivat qualem legem

berty to choose their law, among the Lombards, and also perhaps among the other races. The birth-law of the father was alone regarded; for, if the father, among the Lombards, afterwards became a Priest, his own law underwent a change, but not that of the children, born before his conversion. (58)

But, the wife might follow the law of her husband.

The first exception to this rule is—that married women lived, according to the law of their husbands: (59) and, if they became widows, they reverted to the birth-law. (60) The existence of these customs can be proved only among the Lombards; although, it is extremely probable, that they prevailed also among the other races. The West Goths alone did not admit their application, in the case of the marriage of a Goth with a Roman: because, that marriage was entirely prohibited, and was not allowed, until the Roman Law had been generally abrogated. (61) This change, from the birth-

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voluerit." Adulterium must be here taken in the same extended sense as in the Roman Law.

(58) L. Liutprand. VI. 100.

(59) L. Liutprand. VI. 74.—Lothar. sen. 14. (Canc. i. 196.)

(60) The last cited law of Liutprand might seem to prove the contrary; but, that ordinance relates to certain legal obligations which had been formed, during the existence of the previous marriage.

(61) See below, chap. 8.

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law, by married women, was however a matter of privilege, and not of necessity, as shall be shown below, when treating of the Professiones.

And, the Clerus lived, under the Roman Law; except, among the Lombards.

It was natural, that the ecclesiastical establishment should be controlled by the Roman Law; both, because it was a matter of faith, that the church should continue unchanged; and, because the many peculiar church privileges and law-distinctions of that system, suited better the purposes of the hierarchy, than the Germanic systems, devoid of these recommendations. Similar reasons existed, for regulating the personal law-relations of the Priests. They belonged, by their office, to a new nation—the Clerus; and thus, the Roman might be the birth-law of some, while the many advantages which it afforded to the clergy, might make it the choice of all. Hence, the whole members of the ecclesiastical establishment were considered to be Romans. This rule was early adopted, in the empire of the Franks; where, Chlotaire, A. C. 560, classes that body, and the Provincials or Romans, as governed by the same law. (62) The same practice exists, in the Ripuarian law, and Frank writers of the ninth and eleventh centuries. (63) It

(62) Const. Chlotarii, art. 13.—(Baluz. I. p. 9. Georgisch, p. 468).

(63) L. Ripuar. tit. 58. §. 1. med. (Canc. ii. 311.) "se-

is likewise found among the Lombards, both in the ordinances of their native Kings, (64) and in the laws and authors after the Frank-conquest. (65) Of that privilege, however, the Lombardic Clerus frequently made no use, and preferred living under the Lombardic law; for, that departure from the general custom was tolerated, among the Lombards alone. In the cases of individual Priests, during the ninth, tenth and eleventh centuries, (66) many examples of this deviation occur:

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cundum legem Romanam qua ecclesia vivit." Adrevaldus de miraculis S. Benedicti, Lib. 1. P. 2. C. 2. num. 8. in the Act. Sanctorum. Martii. T. 3. p. 308. 2. Col. infr. "quod Salicae legis judices ecclesiasticas res sub Romana constitutas lege discernere perfecte non possent." Ivonis Carnotens. epist. N. 280. "instituta legum Novellarum quas commendat et servat Romana ecclesia." See below, Chap. xv. n. 71. or, Duchesne, Hist. Franc. Script. iv. 247. med.) Other authorities may be found in Ducange v.lex Romana T. 4. p. 155.

(64) L. Liutprand. VI. 100. (Canc. i. 138.)

(65) L. Long. Ludov. Pii 55. (Canc. i. 193.) "ut omnis ordo ecclesiarum lege Romana vivat." Attonis epist. (see above, n. 43.) "Romani quoque principes . . . . quorum legem etiam nobis Sacerdotibus in multis convenit observare." Lupi, (cod. dipl. Bergom. p. 220,) has been misled, by the L. Pipini 46. (Canc. i. 181.) to adopt the erroneous opinion—that the contrary had prevailed for a considerable time. On the general application of the Lombardic Law to the ecclesiastical establishment, the reader may consult—De usu juris Langobardici apud ecclesiasticos medii aevi diss. inaug. ed. Ant. Franc. Pieri. Florent. 1744. 4to.

(66) Fumagalli cod. dipl. Ambros. Num. 124. p. 502.

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but, in churches and convents, they are less frequent; although, Farfa is an undoubted instance of the affairs of a cloister regulated by the Lombardic Law. (67)

The Personal Law of Freedmen was various.

Regarding Freedmen, the custom of the different nations is less uniform, than in the instances already mentioned. Among the Lombards, the Freedman lived according to the law of his patron; (68) but, among the Burgundians, according to the law of the people, from whom he, even as a slave, was descended. (69) The Ripuarian Law acknowledged two modes of manumission—the Ripuarian, and Roman. By the former, the freed individual acquired the Ripuarian law; and, by the latter, the Roman; and, it depended upon the choice of the Ripuarian

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a. 885. "Ego Teotpertus archipresbiter ecclesie S. Juliani qui professo sum legem vevere langubardorum." See also the case of the Bishop Atto of Bergamo, A. C. 1072, in Ughelli, T. 4. p. 447; and this practice was so frequent in Bergamo, during the 10th and 11th centuries, that the exceptions seem to have almost overturned the rule. Lupi, p. 225.

(67) In a Placitum, at Rome, A. C. 999. the Cloister Farfa demands the duel—"Secundum suam Longobardorum legem," (Mabillon annal. Bened. T. 4. p. 129. *infr.*) Likewise, in a lawsuit of the same convent, A. C. 1014, "quoniam venerabilis locus ad Longobardam permanebat legem" (Mabillon, l. c. p. 705. 1. Col. infr.)

(68) L. Rotharis, 229. (Canc. i. 82.)

(69) Papiani respons. T. 3.

master, which of the two modes should be followed. (70) The other collections contain no enactments, on this subject.

The Birth-Law of the father was, occasionally, dispensed with, by Royal grant.

To these exceptions might be added a fourth;—when, by Royal grant, a Roman or other foreigner was allowed to adopt the law of the predominant nation. This case is probable, both on intrinsic grounds, and from the analogy of an old Lombardic Ordinance, promulgated when the Lombardic and Roman laws were exclusively valid. In it, the King reserves to himself the right of exempting the foreign Germans from the Lombardic system, and of granting them their own birth-law. (71) Direct proof on this subject is, however, wanting.

The Personal Laws of the Parties, Professiones, were specified, in their deeds.

It has been already remarked, that the variety of personal laws existing at the same time, and in the same country, has been no where greater than in Italy. This circumstance must have brought along with it the custom of specifying in Deeds the law, according to which the principal parties or the witnesses lived. (72) At first, this was only

(70) L. Ripuar. T. 58. §. 1.—T. 57. §. 1.—and T. 61. §. 2. compared with T. 36. §. 3. (Canc. i. 306, &c.) See below, n. 109.

(71) See above, n. 15.

(72) Muratori and Lupi—(see above, n. 53)—are also the two principal Authors to be consulted, regarding the Professiones.

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done in transactions between Franks, Alemans and Burgundians. Soon afterwards, it was applied also to the cases of those, who had not come into Italy in considerable numbers, until after the period of the Frank conquest; and, finally, the custom was extended even to the native Lombards and Romans; although, their race and law might well be supposed to have been sufficiently known, in the neighbourhood of their usual residence, without any special notice. Originally, the mere descent was expressed: e. g. N. Alemannus, or, ex genere Alemannorum; and, the law of the individual followed, as a consequence, from the law of his race. Subsequently, the custom arose of referring directly to the law, as to the immediate object of the whole distinction: thus,—Legibus vivens Langobardorum, or more commonly,—qui professus sum legibus vivere Langobardorum.

Natio and Lex have, sometimes, a different signification.

This change, however, did not affect the subject itself, but only the Form of the Notary; although, it must be remembered, that the words Natio and Lex, when occurring together, were often intended to express two different ideas. Natio, was employed in allusion to the birth-law, and Lex in connection with the law acquired by marriage, or by becoming a member of the ecclesiastical establishment: Thus—" qui professa sum

ego ipsa Ferlinda ex *natione* mea legem vivere Langobardorum, sed nunc pro ipso viro meo *legem* viverevideor Salicam : " or—" Landulfus et Petrus clericus Germani . . . qui professi sumus ex *natione* nostra legem vivere Langobardorum, sed ego Petrus clericus per clericalem honorem *lege* videor vivere Romana." (73) The Countess Matilda should have adopted by marriage the Lombardic law, but frequently preferred the Salic, as the law of her birth ; and, this choice is very properly denoted, in several of her deeds, by the following expression : " qui professa sum ex *natione* mea," by descent, not by marriage, " *lege* vivere Salicha. (74) In many other deeds, however, Natio has not this definite signification, but the same general meaning with Lex ; and thus, even married women use the term Natio in reference to the law of their marriage.

Professiones occur only in Italy.

These illustrations may suffice, regarding the leading features of the Professiones. In

(73) Lupi p. 223, seq.—Similar cases occur in Ughelli, T. I. p. 814. 815.—Muratori antiq. T. I. p. 345. C. 387. A. —Wiarda Geschichte des salischen Gesetzes §. 138. 139.

(74) Lupi, p. 227. 228, overlooks the obvious ambiguity of the term ' Natio,' and the above easy explanation ; and, after giving himself much unnecessary trouble with these deeds of Matilda, ends by attributing the expression to the ignorance of the Notary.

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tracing their history, we do not find them, except in Italy. Sometimes, Frank, Roman and Gothic Judges, (75) are mentioned in Placita among the Franks; but, there is no case, in which either the nation,—or the law of the contracting parties, testators, or witnesses, is expressed. The term Professio, also, has never been employed. In Italy, on the other hand, we are enabled to trace the Professiones, during more than 500 years, as is plain, from the following circumstances. In a deed, (75 a) prepared between A. C. 721 and 744, several persons are distinguished as Alemans, apparently, for no other reason, than to designate them more minutely: since, it is extremely probable, that the Alemans in Italy then lived, according to the Lombardic Law. (75 b) There is, in fact, scarcely any likelihood of finding proper Professiones, before the time of the Carlovingian dynasty. A Professio is, no doubt, met with in a testament, A. C. 742; (76) and, also, in a Deed of Donation, A. C. 753; (77) but, both

(75) See below, Chap. 4. 5.

(75 a) See above, n. 16.

(75 b) See above, p. 108.

(76) Mabillon annales Bened. T. 2. p. 704. xxiv. Princ. Muratori, antiq. T. 2. p. 239. C., notices the counterfeit character of these deeds.

(77) Tiraboschi Storia di Nonantola, T. 2. p. 19, "ego . .

documents are spurious. The earliest authentic examples are in the Milan-Deeds of Fumagalli :—thus, in A. C. 807, " Accepi ad te Verohacheri ex Alamannorum genere;" and, still more distinctly, in A. C. 839, " ego qui supra Teutpaldo . . . . legibus vivens Langobarum." (78) Similar examples, varied only in expression, are more common in the ninth century. (79) They abound also in the 10th and 11th, and become again less frequent, after the commencement of the 12th. Muratori erroneously maintains, that after the 12th century, the Professiones were totally disused; but, in a Testament made at Como, A. C. 1297, the Roman law is professed; (80) and, in the Archives at Crema, there are preserved several Professiones of the 14th century. The latest of these is one of the Lombardic Law, and bears date—1334. (81) In Bergamo, they run

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Ariprandus . . . qui professi sumus ex natione nostra legem vivere Langobardorum." Regarding the want of authenticity, compare T. I. p. 340.

(78) Fumagalli, N. 39. 49.

(79) Examples, in this, and the former period, are found both in the already mentioned works of Muratori and Lupi, and in the Collections of Deeds :—particularly, in Fumagalli, Ughelli, &c.

(80) (Sarti) de claris archigymnasii Bononiensis professoribus, P. 2. p. 144.

(81) Canc. ii. 462.

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through the greatest part of that century, and the last is A. C. 1388. (82)

The Personal Law was never arbitrarily chosen.

The rules already laid down, regarding the application of the Leges to individuals, are opposed, in a very important particular, to the opinions of most authors. It has been generally maintained, that every person might, by free choice and without regard to descent, fix the law, according to which he wished to live. Muratori is the principal supporter and propagator of this erroneous opinion : (83) but, others have adopted it, under different. modifications. Some agree, that this choice was made quite capriciously. (83 a) Others, with more caution, admit generally the right of election ; but, from the arbitrary exercise of that right being of rare occurrence, they consider that, in most cases, the law was really determined according to descent. Several of the remaining modifications shall be explained in the course of our examination of the reasons, on which the opinion itself is founded. Lupi (84) pos-

(82) Lupi, p. 230. 231.

(83) Muratori Antiqu. Ital. T. 2. p. 261. D. and Antichità Estensi, P. 1. C. 10. in f.

(83 a) Montlosier. Monarchie Franc. Paris 1814. T. i. p. 21-25. and 367. 386. This writer also maintains, that all the freeborn Gauls became Franks; and that the most respectable part of the Gauls left the cities, and joined the class of Frank landed proprietors in the country.

(84) See above, n. 53.

sesses the merit of having exposed the utter fallacy of this doctrine; although, several of his arguments also require correction. The true and general principle, on this subject, is,—that birth determined the law; and that no caprice whatever was allowed, unless in the uniformly excepted cases of married women —ecclesiastics—and, among some nations, freedmen. So much scope was unquestionably allowed for free will, in these exceptions, as admitted a return to the birth-law; but, in all other circumstances, a voluntary departure from that law was utterly impossible.

This proved.

The reasons for this opinion are the following:—The ordinances, (84 a) in which merely the nation of the individual is given, when the intention is to specify his Personal law: thus, "Alemannus," for "qui lege Alemannorum vivit." These passages plainly imply the identity of the two relations; for, if the choice of the law were free, the use of the national term alone would be both indefinite and insufficient. The Lombardic ordinance of Pipin also (84 b) shows, that the law of each individual was known "ex nomine:" This expression means, from the name of the nation, and not from the name of the individual. Roman and German names were, at

(84 a) See above, p. 124.

(84 b) See above, n. 33.

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that time, so promiscuously used, as to have ceased to be any longer a national distinction. Thus, each individual lived under the Roman or Lombardic law, according as the terms Romanus or Langobardus, were affixed to his name. Another proof of this opinion is found in the rule of the Lombardic treatise; (84 c) which allowed to children born out of wedlock, the free choice of their law. Now, this right, if it had been common to all, could never have been regarded as constituting a difference. Still more convincing, however, is the total omission in deeds of this alleged right of free choice; although, the importance, and the effect of such a right, in rendering the law latent and indiscoverable, urgently required its exercise to be specially mentioned. The improbability of this right existing and remaining unnoticed becomes still stronger, when we find carefully narrated in deeds, the similar cases of wives or ecclesiastics making no use of their privilege. Further, there is not a single authentic lawsuit, in which the Professio cannot be explained by our system, without having recourse to the supposed doctrine of free choice. One case only has even the appearance of being of a contrary description. In A. C. 1104, Oddo Blanco professes Roman law; while

(84 c) See above, n. 57.

his sons in A. C. 1119, adopt the Lombardic. (85) But, the first is evidently a mere error of the copyist. The deed itself speaks of the "Launechild," and, therefore, refers clearly to Lombardic law. (85 a) In both also, it is expressly added—"ex natione mea lege vivere Romana," and—"ex natione nostra lege vivere Langobardorum." These words certainly could not have been used, if either the father or the sons had possessed the right of changing the birth-law, by a free choice. The last reason, in support of our opinion, is the contempt with which the victorious Germans were accustomed to look down upon the subdued Romans. That feeling must have prevented the conquered from passing over, at pleasure, to the nation of the victor; and, this may, with the utmost certainty, be assumed, with reference to those nations whose laws rate the composition for crimes at different sums, according to the nation of the injured.

The Objections answered.

But, the erroneousness of the doctrine of free choice may be shown, in the clearest manner, by a careful examination of the arguments on which it rests, and of the supposed occasions on which it occurs. A misapprehension of the meaning of Professio was, unquestionably, the principal cause of this

(85) Lupi, p. 228.

(85 a) L. Rotharis. 175. (Canc. i. 76. and n. 2.)

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error. That term, particularly when in connexion with the word Lex, was understood to imply—a free choice of the law; while Natio, on the other hand, was considered as indicating the law of the descent. This mistake was supported, by the voluntary deviations of priests and married women, without recollecting, that no conclusion could be drawn, from that circumstance, in proof of a similar voluntary change of the birth-law. The vitiated text of a passage of the Salic law (85 b) was a second source of some of the modifications of this unfounded theory. Upon the authority of that passage, it has been maintained, that, at least in early times, the Roman possessed the right of free choice, (86) although that privilege was denied to the German. By another, and no less objectionable interpretation, the accuracy of both readings has been asserted. They have been understood, as explaining different periods of the law;—and as proving that, in old times, the German and not the Roman, possessed the right of free choice, while, in a later and milder period, the privilege was granted to both. The former case is supported by the Lex Emendata, or the correct

(85 b) See above, p. 105.

(86) Eichorn Deutsche Rechtsgeschichte, Th. I. §. 46. and n. a.

reading; and the latter rests on the Lex Antiquor, which is the vitiated text. (87) Another and more important, but no less futile argument has been founded, on the Lombardic law of Liutprand. (87 a) "De Scribis hoc prospeximus, ut qui chartam scripserit, sive ad legem Langobardorum ... sive ad legem Romanorum, non aliter faciant, nisi quomodo in illis legibus continetur..... Et si unusquisque de lege sua descendere voluerit, et pactiones atque conventiones inter se fecerint, et ambae partes consenserint, istud non reputetur contra legem, quod ambae partes voluntarie faciunt. Et illi, qui tales chartes scripserint, culpabiles non inveniantur esse. Nam quod ad hereditandum pertinet, per legem scribant, etc." Probably, by this passage, Wiarda has been induced—to understand every Professio, not as applying to the law, generally, of the professing individual, but—only to the law of the particular question at issue; and, thus, to interpret the whole custom, as something in itself extremely simple, and conformable to our present practice. (88) Even Lupi, the author

(87) Mably observ. sur l'hist. de France. T. 1. Liv. 1. Ch. 2. n. 7.

(87 a) See above, n. 14.

(88) Wiarda, Geschichte des Salischen Gesetzes, §. 140. sq., refers, as his authority, to Form. Lindenbrog. 66. i. e.

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of the correct view, has allowed himself to be totally misled by this passage. He supposes, that Liutprand had, in particular cases, admitted the right of free choice, and that this very circumstance proves the partial and restricted nature of that privilege. (89) The proper explanation of the passage depends upon a distinction, which is found in the Roman, and must, indeed, occur in every law. There are law-doctrines, in which the State has no proper and immediate interest. These have only, as it were, a subsidiary importance, and may be left to the will of individuals. To this class belongs the definition of obligations by contract, according to the proper distinction made by Paulus, when treating of marriage-contracts—" pacta quae ad jus," and " quae ad voluntatem spectant." (90) Some law-propositions, on the other hand, are placed quite beyond the choice of the contracting parties, and are not matters of

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Marculf. II. 12. (Canc. ii. 229.) But no Professio is there spoken of. The passage relates to a last will. By it, as is common, the intestate order of succession was intended to be changed, and that order is characterized by the testator, as harsh and unreasonable.

(89 p. 215. 216. 218. Lupi likewise maintains, that, by the L. Pipini, 46. (Canc. i. 181.) the old strictness was restored, which is just as groundless as the supposition of its original repeal. See below, n. 107.

(90) L. 12. §. 1. D. de pactis dotal. (23. 4.)

secondary importance, but contain, within them, some great public principle. These were reckoned to belong to the Jus, or the Jus Publicum, and are referred to in the rule—jus publicum privatorum pactis mutari non potest; or, as Pomponius expresses it—"Nec ex praetorio, nec ex solemni jure privatorum conventione quicquam immutandum est, quamvis obligationum causae pactione possint immutari." (91) This jus publicum includes—the forms of solemn acts, e. g. of testaments, which cannot, therefore, be arbitrarily changed. The same principle applies to every relation arising out of connection by blood. (92) Keeping in view, then, this distinction, the law of Liutprand says neither more nor less, than that the notaries shall follow strictly the personal law of the parties; i. e. shall not depart from those rules of the law, which are of absolute necessity, and which belong to the jus publicum; such as the forms of testaments—quod ad hereditandum pertinet. The injunction is not, however, extended

(91) L. 27. D. de R. J. (50. 17.)—L. 45. §. 1. eod.—L. 38. D. de pactis. (2. 14.)—L. 13. C. de testamentis. (6. 23.)

(92) L. 3. D. qui test. fac. (28. 1.) "Testamentifactio non privati sed publici juris est."—L. 34. D. de pactis. (2. 14.) See other examples, in—L. 42. 61. D. de pactis.—Paulus I. 1. §. 6. aliisque locis. (Jus Civ. Antijust. Ed. Hugo. 2. Vols. 8vo. Berlin 1815.)

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to those subsidiary rules of contracts, which are universally left, in some degree, to the pleasure of the parties. Thus, the whole passage authorizes only the arbitrary conditions of Contracts, and has not the least connexion, with any particular principle of the Personal law. It refers, on the contrary, to a perfectly general distinction, admitted, even in the case of Roman citizens; among whom no one can imagine, that there existed, regarding the Personal Law, any free choice or any national difference.

Particularly, that derived, from the Ordinance of Lothaire I, A. C. 824.

The most interesting of all the alleged proofs, in favour of a free choice of the personal law, is contained in the celebrated constitution of Lothaire I., A. C. 824; and, as the Ordinance is not only important, apart from all connexion with this disputed point, but is even single in its kind, we must bestow upon it a careful historical examination. About the time of its promulgation, disputes had arisen between Pope Eugen II. and the Citizens of Rome. In order to compose these, Louis le Debonnaire sent his son Lothaire to Rome, with a commission to examine all necessary matters,—" cum novo pontifice atque Romano populo statueret atque firmaret." Lothaire executed the purpose of his errand, and Eginhard says of him—" statum populi Romani . . . . pontificis benevola assensione cor-

rexit." (93) The law, referred to in this statement of Eginhard, is still in existence; but in two different forms. The first text, which we may call the Roman, consisting of nine chapters, is contained in the Collectio Canonum of the Cardinal Deusdedit, A. C. 1086, or 1087, (94) and was first edited by Holstenius. (95) The other, entitled the Lombardic, has two chapters fewer than the former, and is contained in every collection of the Lombardic Laws. (96) That this Constitution was actually promul-

(93) Eginhardus de gestis Ludov. Pii ad a. 824. ap. Bouquet, T. 6. p. 184. E. 185. D.

(94) Lib. 1. Cap. 242. Concerning this collection, see Ballerin. de antiquis can. collect. P. 4. C. 14; and Zaccaria de duabus antiquis canonum collectionibus, p. 2. contained, in the second part of Galland's Collection. Pertz, Ital. Reisec S. 87, is inclined to refuse to the text of Deusdedit all historical authority, and to consider it rather as a free paraphrase, than an original version.—The Collection of Deusdedit is in the Vatican Library, Cod. MS. 3833; but is without a date; and, according to Gaupp, contains only the following note, upon the margin—ex Const. hlotarii Imp. Sub. ii. Eugenio P. gestis in atrio B. Petri Ap.

(95) Lucae Holstenii collectio Romana bipartita veterum aliquot hist. eccl. monum. Romae 1662. 8. P. 2. p. 208—211. The Constitution has been since reprinted in—Baluz. II. p. 317. (cf. Baluz. praef. § 24).—Bouquet, T. 6. p. 410. —Canc. 5. 24.

(96) L. Long. Lotharii, sen. 34—40. (Canc. 1. 198.) It is also contained, in the Systematic Lombarda, but not in a connected form.

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gated in A. C. 824, and that it is, consequently, capable of being connected with Eginhard's story, is proved not only from the date being mentioned in several MSS. (97), but from its intrinsic connection with the events. The fifth chapter, according to the Roman, and the fourth, according to the Lombardic text, contains the following Ordinance, regarding the Personal Laws:

ROMAN TEXT. C. 5.	LOMBARDIC TEXT. C.4. (97 a)
Volumus etiam ut omnis Senatus et populus Romanus interrogetur quali vult lege vivere, ut sub ea vivat; eisque denuntietur quod procul dubio, si offenderint contra eandem, eidem legi quam profitebantur dispositione Domni Pontificis et nostra omnimodis subjacebunt.	Volumus ut cunctus populus Romanus interrogetur, quali lege vult vivere: ut tali lege, quali vivere professi sunt, vivant. Illisque denuntietur, ut hoc unusquisque, tam judices quam duces, vel reliquus populus sciat. Quod si offensionem contra eandem legem fecerint, eidem legi, qua profitentur vivere, per dispensationem (al. dispositionem) pontificis ac nostram subjaceant.

(97) M.S. Thuan in Baluz. praef. Capit. §. 24: and, likewise, in Holstenius' Edition, which, undoubtedly, follows the Vatican MS. This date contradicts the supposition of the Roman Correctors of the Decretum, at C. 13. Dist. 10, who maintain, that the law was passed, at the request of Pope Leo IV. The supplication to Lothaire, mentioned in C. 13. Dist. 10. with which our constitution is improperly connected, was made afterwards, about A. C. 847. See Baluz. l. c. §. 22.

(97 a) Georgisch. p. 1224.—L. Lothar. 37. in (Canc. l.

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That Ordinance was limited to Rome and its territory.

From this historical illustration, it is plain, that the whole ordinance relates, exclusively, to the City of Rome, and to the Ducatus or country which it governed. The right of free choice of the law was granted to that part of Italy; and, its peculiar state affords a ready explanation why there, and there alone, such a permission was both allowable and proper. In France, Spain, and Northern Italy, the conquered Romans were, universally, mingled with the victorious and predominant Germans. The system of Personal laws followed, as a consequence, from this condition of society; although the self-conceit and arrogance of the victors, rendered a choice of laws utterly impossible. All was, however, otherwise in Rome. That City, since the time of the Heruli and East Goths, had never been conquered by any German race; and, therefore, no other law was tolerated there, except the Roman. But, at the date of the Constitution, when it became also the residence of numerous Germans, under a common German Chief, the introduction of the Personal laws followed. At the commencement of this change, it was necessary, of course, to grant to every person, a free Professio of his law. The

198)—Lombarda ii. 57. al. 58 .See below. Chap. xiv. n. 3. and Chap. v. n. 148. 197 a.

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constant application of the different personal laws in other places, must have easily kept alive the distinctions of descent; but, the very circumstance of that system being an innovation in Rome, proves the disregard and oblivion, into which these relations had previously fallen. In Rome alone, could the right of free choice have been productive of no inconvenience. Rome, by submission, had indeed received Frank masters; but had not, by conquest, been subjected to a foreign victorious people, whose pride must have been offended by the slightest proposal of a free communication of the privileges of their law to the vanquished. This free choice appears to have been introduced, not by allowing the people to elect, by a common resolution; (98) for nothing could be more contrary to the system of personal law, than such a practice; and, it cannot be conceived, why a generally prevailing doctrine should be disregarded, and a principle adopted, which must have defeated the object in view, by continuing the Territorial Ordinances, instead of introducing the Personal Laws. Besides, the decision of such an assembly, must have been in favour of the Roman Law; and thus, the Franks them-

(98) Lupi, p. 220. 221. understands the Law, in that sense.

selves would be compelled to submit to a foreign legislation,—an event utterly beyond the bounds of human belief. Such was not, however, the course pursued. Each individual chose to what nation he wished to belong, and the election, probably, decided the Personal Law, both of himself and his posterity, so as to preclude for ever a recurrence to the same question. The last opinion derives support from the Roman Edict of Otto I, A. C. 962, which repeats literally a great part of the Constitution of Lothaire, but altogether omits the right of free choice. (99) The great majority, in all likelihood, made choice of the Roman Law; and, consequently, that system may have still continued its former character of a proper territorial law. To this circumstance, the somewhat ambiguous gloss of a Paris MS. may perhaps refer. "Non est putandum populum Romanum ulterius esse interrogandum, quando quidem Romana lege confessi sunt se vivere eo tempore." (100) The following Constitution of Conrad II., may also admit of the same application: "Imp. Conradus A. Romanus judicibus. Audita controversia, quae hactenus inter vos et

(99) Chapters 9. 11. 12., of the Edict of Otto (Goldast. Const. Imp. T. ii. p. 45. Frankfort. 1673), contain, almost verbatim, Chap. 3. 1. 4. of the Constitution of Lothaire. (Baluz. ii. 317—320.)

(100) Baluz T. 2. p. 1291. n. volumus.

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Longobardos judices versabatur, nulloque termino quiescebat, sancimus ut quaecunque admodum negotia mota fuerint, tam inter Romanae urbis moenia, quam etiam de foris in Romanis pertinentiis, actore Longobardo vel reo, a vobis duntaxat Romanis legibus terminentur, nulloque tempore reviviscant." While arguing, however, for this connexion, it must not be concealed, that there are some doubts of the authenticity of this Constitution. These are founded on the subject, style, and slender extraneous proof brought forward in its defence. (101) The Constitution of Lothaire is the most frequently quoted authority, in favour of the free choice of the law. By some, it is viewed, as introducing the Professiones into Italy alone; while, (102) others extend its application so widely, as to direct their readers to believe in its ef-

(101) The Constitution has been printed by Senckenberg, (Methodus jurispr. append. 3 §. 17. p. 109), who says, that he took it—"ex codice Bosiano Lipsiæ." Fruitless inquiries have been made after this Bosian MS. in Leipsic; and it is not said to be original, but only to contain extracts from a Roman MS. of the Lombarda, which is passed over, without any more special notice. Recently, however, this Law of Conrad II. has been found in a MS. at Monte-Cassino. Pertz. Ital. Reise, S. 297.

(102) Muratori antiq. Ital. T. 2. p. 239. 240. Tiraboschi Storia di Nonant. T. 1. p. 341.

fects over the whole of Europe. The history of this ordinance, however, clearly shows, that it was intended, at first, merely for the territory subject to the jurisdiction of the city of Rome; although, its admission among the laws of the Lombards may seem to support the opinion of its subsequent validity, among that people also. The great, and almost intentional difference of the two texts, and particularly the omission in the Lombardic of the word "Senatus," as denoting exclusively the city of Rome, have the semblance of confirming this supposition. Nevertheless, it may be considered as utterly groundless. That passage, and the other chapters of the Ordinance of Lothaire, have preserved, even in the Lombardic text, their original and limited application to Rome, and have never become Lombardic law. This is plain, from the mention of the Pope in our preceding quotation; since, no Lombardic law ever attributed to his Holiness the smallest temporal power. Another evidence, no less decisive on this question, is afforded by the expression—"Populus Romanus;" for, although the Provincial Romans are always styled Romani in other passages, they are never designated, as here, by the collective phraseology. The only remaining authority against the validity of this constitution among the Lombards is—that almost all the passages of the Lombarda, taken

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from the Lotharic constitution, and particularly our quotation, are not provided with the common gloss of Carolus de Tocco. Finally, how these passages found a place among the Lombardic laws, even when it was not intended to incorporate them with that system, is easily explained. The distinction between the Frank conquests, in Rome and in Lombardy, was not so broad and unvarying, as to prevent the laws of both from being confounded together by collectors and copyists. Our ordinance, likewise, regarding the free choice of the law in Rome, although nominally intended for the Judges in the Roman territory alone, had important effects on the administration of justice, in the adjoining Lombardic districts.

B. The Personal Law doctrines applied to Cases.

These observations have been directed solely to the illustration of the laws of individuals; but, the second branch of the inquiry now demands our attention. In proceeding to apply the Personal Law doctrines to cases, the researches become unusually difficult, both on account of the possible collision of different personal laws, and by reason of our comparatively greater want of authorities. The same rules have not been uniformly followed by every people, and probably the investigation has never before been conducted in a sifting and satisfactory manner. Still an at-

tempt must be made to arrange the existing sources, as far as possible, into a system.

The Law of the Case was regulated by that of the defendant.

The composition for crimes was regulated by the condition of the injured. (103) In other suits, the law seems to have depended on the defendant. (104) An application of this doctrine occurs in a Placitum, A. C. 797, in which the Frank King, as plaintiff against the Abbey of Prum, submits to have the case tried by Roman Judges and Roman law. (105) Another important confirmation of this rule is contained in the—Constitutio Chlotarii. (105 a) According to this ordinance, church-property and the possessions of priests and Romans, if held during thirty years without challenge, are secured against every claimant, even if he should be a Frank. The Roman doctrine of prescription, as applicable to the Roman defendant, is here generally applied without any regard to the nation of the plaintiff. In later times, this rule does not seem

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(103) L. Long. Pipini, 28. 46. med. (Canc. i. 179. 181.) See also in Baluz. I. 259 art. 4. & 538. art. 17.

(104) L. Long. Pipini, 29. (Canc. & Baluz. l. c.) "De statu vero ingenuitatis, aut aliis querelis, unusquisque homo secundum suam legem *se ipsum defendat.*" The old gloss in Georgisch. p. 1184, applies the passage to the law of the defendant.

(105) See below cap. 5. n. 63.

(105 a) A. 560. Art. 13. in Georgisch. p. 468. or Baluz. i. 9.

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to have been constantly observed;—as is plain from the frequent examples of mixed courts, to be afterwards quoted, and from the processes of the Cloister of Farfa, A. C. 999 and 1014, between Lombards and Romans. In these, both laws are not only pleaded by the parties, but, on one occasion, noticed and applied by the Judges. (106) Apart, however, from that later usage, the rule itself was from the first limited, although not universally, by the following modifications and exceptions. The validity of unilateral judicial acts, depended on the law of the party, as, in the cases of oath and testaments. Contracts were, likewise, prepared, according to the law of the debtor. (107) The whole order of succession was regulated by the law of the testator, or ancestor. (108) Among the Burgundians alone there existed a particular custom, by which each Burgundian was allowed to have Testaments and Deeds of Donation

(106) Mabillon ann. Bened. T. 4. p. 129. 239. 704. "Collatis Justinianae et Langobardorum capitulis legis .... dederunt sententiam." ibid. p. 705. med.

(107) L. Long. Liutpr. VI. 37. (Canc. i. 121.) Pipini 46. (Canc. i. 181.) It is quite accidental, that, in the first passage, and not in the second, a distinction is expressed between the jus publicum, and the option of the parties. The opinion—that the second is only the first slightly changed, is quite a mistake. See above, p. 141. med. and n. 89.

(108) L. Long. Liutpr. VI. 37. Pipini 46.

prepared, either according to the Burgundian, or Roman law. (109) Among the Ripuarians, a slave might be manumitted according to the Roman law. (110) Marriage must be celebrated, according to the law of the husband,—which, from the date of the marriage, became also the law of the wife. (110 a) Marriages celebrated, according to the birth-law of the wife, were declared null; and the Church Council, which prohibited that custom, founded the prohibition only on religious grounds, and not on any temporal law. (111) In questions affecting the property of landed estates, the personal law of the author was the rule. (112) Runaway slaves must be judged by the law of the reclaiming master; and, if he was Roman or Lombardic, his right was exposed to the operation of prescription; but, if neither, that plea could not be effectual against him. (113)

(109) L. Burgund. T. 60. §. 1. med. (Canc. iv. 30.) A similar choice appears to have been allowed in the case of Manumissions, T. 88. §. 2. (Canc. l. c. 36); although, the Roman law there can scarcely be recognised, and must be founded on misapprehension.

(110) See above, p. 128, and n. 70.

(110 a) See above, p. 125.

(111) Concil. Triburiense a. 895. C. 39. (Mansi T. 18. p. 151.) and very different in Burchard. Lib. 9. c. 76. ed. Paris. 1549. (cf. Mansi l. c. p. 162.) See also Hardwin's Coll. T. vi. P. i. p. 452. Paris 1714.

(112) L. Burgund. T. 55. §. 2. (Canc. iv. 30.) Capit. II. a. 819. art. 8. (Baluz. I. p. 606).

(113) L. Long. Caroli M. 89. (Canc. i. 160.)

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The personal or National Laws—Leges, were limited, by certain general Capitularies.

Having thus illustrated, the various distinctions, created by the personal law-system, it may not be improper to define the limits, by which its privileges were bounded. In every period, and among all the nations who admitted the doctrines of personal law, there were many ordinances equally binding on Germans and Romans. The laws of the predominant race, expressly defining the rights of the other nations, may be placed at the head of these general enactments. Thus, the robbery of a Frank, was punished, among the Franks, according to the Salic law; and, that of a Roman, according to the Roman law, without any regard to the condition of the robber. (114) But, by the former law, the robber of a Frank was condemned, in the payment of 62½ Solidi; while, on the other hand, the Frank, who robbed the Roman, payed only 30 solidi. (115) In this last case, therefore, the composition of the foreign Salic law was forced upon the Roman; and, the Roman law was only allowed him, in the case, where the robber was also a Roman. The Royal Ordinance, (115 a) by which the composition of crimes perpetrated against the Priest-

(114) See above, n. 103.

(115) L. Sal. emend. T. 15. (pactus T. 16.) §. 1. 2. 3. (Canc. ii. 42. 131.)

(115 a) L. Long. Carol. 101. (Canc. 1. 161.)

hood is regulated, affords another instance of an arbitrary modification of the laws of particular nations: for, according to the general rule, these offences, as they were committed against the Clergy, ought to have been punished, according to the Roman law, and not by a composition in money. Another example occurs in the Lombardic law—where, King Aistulph regulates the Usucapio between the Church and the Lombards, in an entirely new manner, by depriving the Church of their proper law—the Roman—and substituting the Lombardic in its stead. (116) The imperial ordinances of the Franks—Capitularia, which, after the extension of their empire, were distinguished from the national laws, Leges, arose from an enlargement of the same principle. All royal enactments, particularly in later times, were called Capitularia, or Capitula. The King had a double character; the one, as chief of each individual tribe, and the other as head of the

(116) L. Long. Aistulph 9. (Canc. i. 147.) A similar enactment is contained, in the supplement to the Laws of King Edgar:—"Deinde volo, ut in usu sit apud Danos quam optima eligi possit Lex," (Canc. iv. 275. 2. Col. supr.) The passage relates to the composition for a single crime; and, without attending to this connection, there is a danger of adopting the erroneous opinion, that the Danes were allowed the free choice of their personal law.

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whole nation. Hence, the Capitularies also, are of two classes; those, defining the law of a particular race; e. g. capitula addita ad legem Salicam, and those, of general application, over the whole Frank territory. (117) In the kingdom of the Franks, with which so many different nations were incorporated, the Capitularies are so frequently general, under the Carlovingian dynasty, that when their character is not specially fixed, they may be understood as belonging to that class. In Lombardic Italy, on the contrary, where the Lombards and Romans were the only distinct people, most of the ordinances of Charles and his successors must be understood, as constituting exclusively Lombardic law. For this reason, probably, they have been inserted in all the early collections of that law, and were, consequently, never obligatory on the Romans.

But, these were not of universal application; nor, were they, every where, the same.

It is, however, of great importance to determine, accurately, the limits of the general Capitularies. The laws of the race of Charlemagne have been, erroneously, supposed to apply to all the subjects of their extensive

(117) The contents of the former are generally taken from the latter, and become special only by a formal application to a particular race. Amendments of a national law were not usually introduced by separate capitularies; but, by an alteration on the text of the law itself. Eichhorn deutsche Rechtsgesch. Th. I. §. 142. 149.

empire. These princes reigned over three distinct kingdoms: the Frankish, Lombardic, and that which, under the name of Rome and the Exarchate, had recently constituted part of the Greek empire. No Capitulary, however general, could overstep the boundaries of that state, in which it had originated. The only exceptions to this rule, were some clerical laws; (118) and, their universal validity arose, from the unity of the Church, and from the common old ecclesiastical authorities, on which they were founded. No example of a similarly general application is found in any of the temporal ordinances. (119) The following passages refer to the difference between the powers of Capitularia and Leges. A Lombardic statute of Pipin, regulating the application of the personal laws to Lombards and Romans, concludes in the following manner,—" de ceteris vero caussis communi lege vivant, quam dominus Karolus excellentissimus rex Francorum et Langobardorum in

(118) Thus, a Council at Aachen, (Aix la Chapelle) a. 816. Cap. 16., contains an ordinance, regarding the Lombardic Bishops. Baluz. T. 1. p. 566.

(119) This view, adopted also by Muratori, Script. T. i. P. 2. praef. p. 2., has been excellently illustrated, by Canc. iii. 129. 130. 134. 135., in the Preface to his Ed. of the Capit. A passage in the Capit. lib. VI. C. 366., which might appear at variance with it, has been already examined in n. 25.

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edictum adjunxit." (120) The meaning here is not, that all private law, excepting the particular cases shortly before specified, shall be taken from the Capitularies; for, these were, in fact, very defective in private ordinances: but, the passage signifies, that the rules of the private law having been sufficiently specified in the enumerated cases, the "ceterae causae," or rights of the Frank government in Lombardy, shall be regulated by the general Capitularies, or Communi Lege of that portion of the empire. Louis le Debonnaire's Capitulary, from Thionville, A. C. 820, refers to the same distinction. By it the former enactments, regarding the Lex Salica, are no longer to be called Capitula,—"sed tantum lex dicantur, immo pro lege teneantur." (121) Now, these words have been understood, by several authors, as increasing the authority of the Capitularies. The very reverse, however, is the object of this new ordinance, which was intended to obviate the errors that might arise from the use of the term

(120) L. Long. Pipini, 46. (Canc. i. 181.)

(121) Baluz. T. 1. p. 623. supr. But, the passage is ascribed in the Lombardic Laws to Charlemagne, L. Car. 143. (Canc. i. 167.) It appears, however, from its contents, to have been erroneously inserted among the Lombardic Laws. Wiarda, Gesch. des Sal. Gesetzes S. 128, has endeavoured to raise doubts, regarding the authenticity of the whole passage.

Capitula, and to prevent the statutes promulgated exclusively for the Salic Franks, from being regarded as imperial and general throughout the Frank territory. According to a Lombardic ordinance of Lothaire I., the Capitula of his father and grandfather, which he collected, are declared to be Leges, in that part of the Empire. (122) The distinction made by Charles the Bald in France, between Leges Mundanas, Ecclesiasticas and Capitula, has been already noticed. (123) Otta II. likewise, orders, that his Capitula, regarding the duel, shall be observed by all his subjects in Lombardy, including even those who lived under the Lex Romana. (124) A reference to the same relation is found, in a passage of Hinkmar, where he complains, that selfish individuals sometimes rested their pleas on the Capitula, and sometimes on the Leges, according as they expected to find their advantage, in the one or in the other. (125) This passage has been viewed, as authorizing a free choice of the Personal law;

(122) L. Long. Lotharii sen. 70. (Canc. i. 204.)

(123) See above, p. 122. and n. 51.

(124) L. Long. Ottonis II. Cap. i. §. 10. (Canc. i. 233.)

(125) Hincmari epist. 15 ad episcopos pro Carolomanno Cap. 15, Opp. T. 2. p. 224. ed. Paris 1645 f. "Quando enim sperant aliquid lucrari, ad legem se convertunt: quando vero per legem non aestimant acquirere, ad Capitula confugiunt: sicque interdum fit, ut nec Capitula pleniter conserventur, sed pro nihilo habeantur, nec lex."

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but, a Professio of the Capitularies no where occurs, and was, indeed, quite impossible. The passage plainly refers to the effects, which the Imperial or general law produced on the personal laws. These might often create doubts in practice, and might become the pretext for that unprincipled conduct, of which Hinckmar complains.

Resemblance between the early and later condition of the Personal Laws in France.

The decline of the Personal law—the disappearance of German law in Italy—the generality of the Roman law—and the origin of local statutes, chiefly belong to the subsequent part of this work; but, the close resemblance, subsisting between the early and later condition of the personal laws among the Franks, cannot be more conveniently noticed than at present. Until the introduction of the Code Napoleon, Northern and Southern France possessed different laws; the former having Coutumes, and the latter, Droit écrit. This distinction arose, from the Roman law having lost its authority, as a personal law, among the Franks of the North, while its validity continued, among those of the South. A clear proof of this change is found, in a decretal, A. C. 1220; (126) "in Francia et nonnullis provinciis laici Romanorum imperatorum legibus non utuntur." A similar statement is made, in the already quoted

(126) Decret. Greg. Cap. 28. X. de privilegiis (V. 33).

Edict of Charles the Bald, A. C. 864; in which the very remarkable declaration occurs,—that the validity of the Roman law was never impaired, by legislative enactment: "Super illam legem (Romanam) vel contra ipsam legem nec antecessores nostri quodcunque Capitulum statuerunt, nec nos aliquid constituimus." (127) Many passages of the same Edict distinguish, likewise, between the authority of the Roman law in the different parts of France:—in illa terra in quâ judicia secundum legem Romanam terminantur, secundum ipsam legem judicetur. Et in illa terra in quâ judicia secundum legem Romanam non judicantur etc. (127 a) Montesquieu, (127 b) gives the following explanation of this change. Because the Franks, in their laws, treated the Romans unequally, the latter soon renounced their own nation, and received the law of their Conquerors. The Burgundians and Goths, on the other hand, did not oppress the Romans in their laws; and, therefore, in these kingdoms, the Romans continued to adhere to their native law. This explanation is, however, completely erroneous. It implies the free election of the Personal law, a doc-

(127) Edictum Pistense, Cap. 20. (Baluz. ii. 183. med.)

(127 a) Cap. 16. 23. 13. 20. 31.

(127 b) Esprit des Loix, XXVIII. 4.

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trine already shown to be inaccurate; and if true, we cannot conceive why the Goths, Burgundians and Romans of the Southern Provinces, did not also exchange their native law for that of the victorious Franks. The same inducement of high compositions, which is the alleged cause of the alteration in the north, ought to have produced the like effect among the inhabitants of the Frank provinces of the south.

Mode, in which the Territorial laws were, afterwards, introduced.

The Edict of Charles the Bald is perfectly silent, regarding the subsequent distinction of Territorial laws. Notice is, no doubt, taken of the contrast, between the legal condition of some of the provinces; but, this applies to the Roman, or German laws of the inhabitants personally, and not to any proper Territorial law, then existing. (127 c) This explanation of the apparently ambiguous language of the Edict, is both accurate and important. Properly, the distinction is applied to the individuals only; but since, in many districts, Romans almost exclusively resided, the names of those districts are mentioned, instead of the names of their inhabitants: and, this is not the Territorial law of later times, but only an approximation or resemblance to it. It must likewise be observed, that the countries, which this

(127 c) Cap. 28. 34.

Edict distinguishes from those where the Roman law prevailed, were not necessarily under the exclusive influence of Frank law. On the contrary, all the Personal laws together might have existed in a part of them. Now, this condition of imperfect territorial law, seems to have arisen from the different manner in which the Franks completed their various conquests. The original inhabitants of the Northern Provinces, upon whom the first emigration spent its fury, were exposed to all the oppressions and cruelties of the invading hosts of Barbarians; and this vengeance particularly overtook the rich and the distinguished. When the conquerors, however, afterwards extended the boundaries of their already established Empire, their numbers had diminished, and their ferocity abated. The same preponderance consequently, which the Franks had acquired in the North, was maintained, by the original inhabitants in the South; and thus, the imperfect territorial law of Charles' Edict appears to be sufficiently explained. But, what were the causes, which changed this condition, into that true territorial law, subsequently prevalent in France? Such a transition appears to contradict the whole theory of Personal Laws, in support of which, it has been maintained,—that even in a district, where only a few Romans dwelt, the Roman Law must have been preserved,—

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that there was no necessity for sacrificing it, on account of convenience, to the Frank law, and—that such an adoption of the law of the conquerors could only be asserted by those, who believed in the erroneous doctrine of the vanquished having been allowed the free choice of their law. The discordancy is, notwithstanding, only apparent. The true occasions of the introduction of the proper Territorial Law may be traced—to the total subversion of the Law-relations of preceding times, and—to the disappearance of the old German and national law-characteristics. Both events happened, at the same time, and from the same causes. The ancient tribes themselves, with whose existence that of the Personal laws was connected, had passed away, and new nations had rapidly arisen, by intermarriages and amalgamation. In these circumstances, the personal laws of the old races could not be continued: and, the following seems to have been the progress of the transition. The systems of feudal subjection and of villeinage changed the nation, from a mass of free communities, into a body of military vassals and serving dependants. The freemen now changed the equality of a national law for the ordinances of a lord or the caprices of a master. The customs of feudalism had, no doubt, adopted many of the national ordinances, and preserved much of the spirit of

the national systems; but, the distinctions of nations had ceased; and feudal usages, instead of national laws, became the birthright of all. The preponderance of German law-doctrines having been established in the northern part of France, they formed the model of the law of the Cours de Seigneurs: and the Roman law, which had been hitherto preserved in these countries, only by the national origin of individuals, totally disappeared. The converse happened in the south of France; for, there, the Romans, by their numbers, had retained the supremacy. The same reasons account for the abrogation of the Roman law in Germany; although, both in the sixth and seventh centuries, it must have been the Personal law of many of the inhabitants of the countries upon the banks of the Rhine. (128)

The influence of the Roman Law was general over France; but greatest, in the South.

Another important distinction, between the Northern and Southern regions of France, must not be overlooked. In the north, the direct authority of the old National laws ceased. Even the name of the Salic law fell into disuse, and systems, merely local,—coutumes, occupied its place. In the South, on the contrary, the Roman law continued to prevail in

(128) This explanation of the effect of the villein services and feudal usages on the later condition of the law, was suggested by Eichhorn.

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its old form and exclusive character; although, both the Roman and Frank races had been changed into a new nation. This decline of the old German Laws arose, from two causes. In the new nation generally, as is shown by the language, the Roman element predominated; and the German laws, coinciding only with the old condition of the people, could not be adapted to an advanced state of society, without a total change; while, the Roman law, having already undergone manifold vicissitudes during the existence of the Roman power, might, by the generality and broadness of its principles, be applied to the most different conditions of national advancement. It thus became externally, the personal or national law of the south of France; while intrinsically, its doctrines acquired a universal influence, and became, in a certain degree, the common source of European Jurisprudence. (128 a)

(128 a) Concerning the distinction, between the Pays Coutumiers and de Droit Ecrit, the reader may consult Berriat Saint-Prix, hist. du Droit Romain, p. 218–231. Paris, 1821, 8vo. This author limits the extent of the former much more than is usually done. He excludes from the Pays Coutumiers those countries—where the Roman is acknowledged as Common Law in the Coutumes—where it forms their basis or—where it is referred to by them; since, in all these, it is, unquestionably, the Common Law. After that separation, the Coutumes of Paris, Bretagne and Normandy alone

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The Roman Law always continued, in the Cities of Lombardy.

The course of events, among the Lombards, differed from the above only in a few particulars. The Lombardic cities early became powerful, and prevented those sudden and complete alterations which had been effected in France and Germany by the creation of new confederacies. The statutes of the cities did not possess the same power of dissolving old habits and customs; and, thus the Lombardic Law remained much longer valid in conjunction with the Roman, than any other of the German laws, in countries formerly subject to Rome. That the Roman Law did not merely continue a languishing existence, but flourished with a new vigour, is plain from the renovated power of the cities, which were forced to adopt that law

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remain. Nevertheless, even in these, the Roman has been the Common Law; for, in the 'établissements de S. Louis,' A. C. 1270, it is acknowledged as such; and, excepting it, no other subsidiary law existed. In these three districts, indeed, the Roman law alone could not be quoted as an authority for reducing a judgment, and cannot, at present, be used in any part of France, for that purpose. It appears, however, that by this system, the whole distinction may be frittered away; although, its existence as a historical fact, at least since the time of the Ed. Pistense, cannot be disputed. Still, it may be safely admitted, that the Roman law, by the influence of the Universities, and of the practical lawyers educated there, had again gradually acquired in the northern part of France, a real influence.

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by their own intrinsic wants, as well as by the connection of circumstances. The necessary train of events therefore, and not accident, occasioned the renewed culture of the Roman law—to begin in Italy, where the cities first obtained importance, and to—spread, only at a later period, over France and Germany. This regeneration of the Roman law has continued its influence, down to our times, and shall form the subject of discussion, in the following parts of this work.

CHAPTER IV.

THE JUDICIAL SYSTEM OF THE GERMANS, BEFORE AND AFTER THE CONQUEST. (a)

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The Germans had National Institutions before the Conquest.

THE judicial institutions of the German States, settled in countries formerly constituting a part of the Roman Empire, come now to be examined; but, as the means of enabling us to comprehend their state after the conquest, we must begin by taking a retrospect of their earlier condition. The representation of the invading German tribes, given by Sismondi, and many other modern authors, must indeed be admitted to partake largely of the marvellous, and to be without example in history. We are told,—that they were hordes of robbers, intent only on plunder, and the overthrow of Rome; that their conduct, after the destruction of that Empire, accorded with their original habits;—

(a) Besides such general works as Eichhorn, Deutche Staats-und Rechtsgeschichte, the reader may consult "Esprit origine et progrès des Institutions Judiciares des principaux Pays de l'Europe, par J. D. Meyer." Tom 1. (partie ancienne) à la Haye, 1818. 8vo.

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that they never had possessed a native country or permanent abodes; that, they were consequently devoid of all old recollections, customs and national characteristics;—and that their institutions, after the conquest, were thus formed upon a new and arbitrary model, according to the wants of the moment. It is only necessary to consider this account attentively and without prejudice, in order to reject it, as historically unfounded.

Although the character of these is not now easily explained.

Although, therefore, the existence of an old and original constitution, among the German nations, be unquestionable, the difficulties attending an accurate definition of its character, are of no ordinary magnitude. These are occasioned by the total want of cotemporary native chronicles, and by the little dependence to be placed upon the indefinite and vague accounts of the Romans, which partake of all the faults inseparable from a perfect ignorance of the language and peculiar customs of the foreign people, whom it was their intention to describe. The multiplicity of the German Tribes, whose boundaries, names and connection, scarcely any foreigner could explore, must have still further increased the difficulties of the Roman historians. Amidst this general darkness, there is fortunately one infallible source of historical information. In a number of deeds prepared since the German conquests, many

notices occur, concerning the constitution of the invaders. When, therefore, we find among the various German tribes, in different countries and circumstances, certain general features and coincidences universally the same, we are entitled to view these as parts of the old pure Germanic constitution, and as connected with a period, when the subsequently divided tribes lived together in a close national union. The fundamental principles of the Germanic judicial system, present an accordance of this description, and may, therefore be considered as of high authority, and undoubted originality. By commencing with an explanation of the general features of this resemblance, we shall be better enabled to comprehend its details.

Their general features are preserved in the Judicial system.

The nation was formed by the union of the freemen, from whom all power and every legislative enactment proceeded. The political constitution arose from the division of the land into certain districts, Gauen, and from the freemen of each being bound together, by a close political dependance. At the head of each of these divisions, stood a Count, Graf, commanding in national warfare the freemen, presiding in the Courts of Justice, and occasionally transferring to deputies portions of his duty. In the Courts, this Count, or his deputy, was merely the President, and not the Judge.

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The right of deciding was vested either in all the freemen of the district, or in an arbitrarily chosen number of them, who tried both the facts and the law of the case at issue. This practice was changed, indeed, about the time of Charlemagne, by electing certain freemen to the office of Judges, and forming them into a separate order. The new arrangement, however, did not deprive the other freemen of their former rights, or prevent them from assuming, at pleasure, their judicial functions. There are, consequently, two orders of German Judges;—the elected, bearing the titles of Scabini, Judices, &c. in laws and deeds; and —the ordinary freemen. For the purpose of avoiding repetition and confusion, both of these classes shall be designated by the general title of Judicators—Schöffen. (b)

The Freemen, Judicators, and Counts with their Deputies.

These are the most essential parts of the constitution for our purpose; but, the following also deserve attention. The existence of an original nobility, as a particular patrician order, and not as a class indefinitely distinguished by their wealth and respectability, cannot be questioned. It is difficult to say from what origin this distinction may have proceeded: whether it was connected with the services of religion, or with the posses-

(b) See below, n. 71. a.

sion of the heritable offices of Counts. We may affirm, however, with certainty, that the honour enjoyed, was merely personal, (1) and conferred no preponderance in the political or judicial systems. In these, the freemen alone possessed the whole power, and the nobles are noticed only as freemen. (2) The office of king appears to have been by no means general in the early times; but, after the conquest of the Roman provinces, its adoption became universal. The authority of the Duke, likewise, was at first limited to the continuance of the war. This officer commanded the army as general, and the Counts acted under him, as Coloncls of their different regiments. (3) Even after-

(1) Thus, in Bavaria, the five noble families had double, and the family of the Duke, four-fold composition. The names of these families, according to the spelling of the different manuscripts, may be seen in Leges Bajuv. ed. Mederer, III. 1. § 1. p. 99–101. (in Georgisch, II. 20. § 1. 2. or Canc. ii. 366.) In the same manner, the nobility, in the Frisian, Anglian and Saxon laws, are rated at a higher composition.

(2) Tacitus (Germ. c. 11.) long ago made this remark. "De minoribus rebus Principes consultant, de majoribus omnes: ita tamen, ut ea quoque, quorum penes plebem arbitrium est, apud Principes pertractentur." The supreme power was thus possessed by that community of freemen, which Tacitus here calls 'plebs.'

(3) Möser Osnabrückische Gesch. Th. 1. Abschn. 4. §. 6. In Tacitus, de Mor. Germ., the Duces (c. 7.) are not to be con-

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wards, when Dukes were appointed permanently over certain provinces, the office itself continued unchanged; and, their occasional possession of jurisdiction in some districts, probably arose from the functions of Count and Duke having been conjoined in the same person. (4) The Dukes of conquered tribes, such as those of the Alemans and Bavarians in the Frank Empire, were differently situated, and were, in fact, dependant Kings over their own countrymen. The Freemen, Judicators, and Counts with their deputies, formed, however, the most important classes under the old Germanic constitution, and are, besides, the most intimately connected with our subject. It is necessary, therefore, to bestow upon each a careful examination.

THE FREEMEN.

The Freemen were the Basis of the Germanic Courts and Constitutions.

The freemen were the basis of the Constitution of all the German Tribes. The essen-

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founded with the Principes. (C. 12.) Concerning the temporary office of the Duke, see Witichindus Corbei. Lib. 1. annal. in Meibom. Script. rer. Germ. T. 1. p. 634. supr. Helmst. 1688. fol. "A tribus etiam principibus totius gentis ducatus administrabatur .... Si autem universale bellum ingrueret, forte (leg. sorte) elegitur cui omnes obedire oporteat, ad administrandum imminens bellum. Quo peracto, æquo jure ac propria potestate unusquisque contentus vivebat."

(4) Eichhorn Deutsche Rechtsgeschichte, Th. 1. §. 24.

tial character of that order, did not consist in the simple immunity from slavery, or in the enjoyment of personal liberty, merely negative advantages, but in the perfect capacity of acquiring rights, and of participating in all the legal privileges of the nation. This distinction, which we shall call 'dignity,' after Möser's excellently chosen term of Ehre, belonged to all the freemen; although the dignity of the nobility, as more exalted, gave them the precedence of the others. (5) In the Roman Constitution, Caput corresponds with this dignity, and the Civis optimo jure was the freemen: for, during the existence of the free constitution, when the Patricians were distinguished, more by a rank derived from the most ancient times, than

(5) Möser Osnabrückische Geschichte, preface. For the proofs of many of the following statements, the curious reader is referred to that author's incomparable works, particularly to the one just quoted. The above view of the condition of the freemen is disputed by Guizot, Essais sur l'Histoire de France, p. 233. Paris 1823. 8vo. He supposes that it was our intention to apply the same description to the freemen of all times. Against this doctrine, he properly maintains, that the old freemen were subsequently incorporated or absorbed among the vassals, and no longer continued to form a separate and peculiar order. This, however, is really our opinion; and, if the latter circumstances of the constitution had been the object of inquiry, the change would have been noticed.

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by constitutional privileges, the fundamental idea of Civis equally included both. Among the Romans, the civis might acquire Dominium ex jure Quiritium, and the full rights of property, were also connected with the order of freemen among the Germans. The detailed examination of this Germanic order is, in many respects, intimately connected with the Judicators; and both serve to explain each other. At present, however, it may be assumed, that no person could be a Judicator, or be capable of judging, and giving testimony, who was not a freeman; (6) and whether the whole body of freemen, or only a limited number of them, possessed these rights, shall be afterwards ascertained.

Among the Lombards, the Freemen were called Arimen.

Let us begin our inquiry with the Lombards. Among them, the term Arimann was used to denote the order of Freemen, as distinguished from Bondmen vassals, and those official persons, to whom the freemen owed obedience.

They were distinguished from the Bondmen and Vassals.

1. There can be no doubt, that such is the true meaning of the term. Thus, in the Laws of Rachis, the same women, styled at the beginning liberæ feminæ, are

(6) Möser ut supra, Th. 1. Abschn. 1. §. 22.—Abschn. 4. §. 10. See below n. 71. a.

towards the end called Arimannae. (7) In a deed of Louis le Debonnaire, the expression is used in the same sense, and with a reference to the Law of Rachis. Another deed of the same Emperor says: Videlicet feminis liberis, quas Itali Herimannas vocant. (8) In a Placitum at Milan, A. C. 901, it was disputed, whether certain persons were Aldii or Liberi, and, the term Arimanni is used as synonymous with Liberi. (9) Likewise, Otto I., A. C. 967, grants to a cloister a Castle "cum liberis hominibus qui vulgo Herimanni vocantur." (10) Henry IV. also, in a deed from Verona, A. C. 1084, says, "donamus insuper . . . monasterio . . . liberos homines, quos vulgo Arimannos vocant, habitantes in castello S. Viti." (11) We must not, however, overlook the apparent objection, derived from a diploma of Charlemagne, A. C. 808, in which he grants, as a fief, to the Bishop of Piacenza "omnem judiciariam vel omne teloneum de curte Gusiano, tam de Arimannis, quam et de aliis liberis

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(7) Compare L. Long. Rachis 2. (Canc. 1. 140.)—Rotharis 222. (ibid 81.)—Liutprand IV. 6. (ibid 107.)

(8) Both deeds are quoted by Ducange v. Herimanni, T. 3. p. 1120. 1121.

(9) Muratori, ant. It. T. 1. p. 717.

(10) Muratori l. c. p. 735. C.

(11) Muratori, l. c. p. 740. B.

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hominibus." (12) According to this passage, only a part of the freemen seem to have borne that name. The Arimen, however, were the free Lombards of the old national constitution, before the introduction of the feudal system; and thus, the Alii liberi homines, here distinguished from the Arimen, were most probably—Romans, or —foreign Germans, Franks or—free vassals, who stood in the feudal connection, and were bound to serve their liege Lords, in addition to their obligation to attend the national assemblies, under the Counts. When, therefore, the expression liberi homines simply is used in deeds, as descriptive of personal character, (13) it has the same meaning with Arimanni, and signifies free Lombards.

And from the Comes, or official person, to whom they owed obedience.

2. The same term is used to denote that relation which subsisted between the freemen, and the Judex, Comes, or regular magistrate of the old constitution. Vassals and bondmen stood in a totally different connection and dependance. "Nemo Comes,

(12) Muratori, l. c. p. 741. D.

(13) Tiraboschi Storia di Nonantola, T. 2. N. 36. p. 52. (circa a. 845) "ego petrus filius quondam petronati abitator in obstilia livero homo;" and, in the same work, N. 41, p. 56. a. 861.

neque loco ejus positus, neque Sculdasius ab Arimannis suis aliquid per vim exigat, præter quod constitutum legibus est." Again, "Si . . . comes loci ad defensionem loci patriæ suos Arimannos hostiliter præparare monuerit." etc. (13 a) There are many other passages in the Lombardic laws of similar import. (14) In the same sense, an old glossary says, "Arimanus, herman Miles gregalis, qui publicum munus non habet." (15)

The Judicial functions of the freemen.

3. The Arimen were Judicators in the Courts. Thus in a Placitum, at Lucca, A. C. 785.—Dum in Jesu Christi nomine residentem Allonem ducem una cum . . . . Haremannos, id est Tusso Presbiter, Alio Presbiter etc . . . . Et . . justum nobis paruit esse una cum suprascriptos sacerdotes et Haremannos ita judicavimus." (16) Likewise, they occur in a Placitum at Mantua, A. C. 1126 (17). Liberi homines, are found al-

(13 a) L. Long. Guidonis. 3. 4. (Canc. 1. 225.)

(14) L. Long. Rachis 6. fin. (Canc. i. 142.) Liutprand. C. V. 15. fin. (ibid. 112.) The last passage speaks of runaway slaves. The Count, in whose district they are found, must notify their residence to the proprietor, or to the proprietor's Count. In the last case, the Count to whom the intimation was made, must either send for the slave, or give notice, "Arimanno suo," i. e. to the freeman living under his jurisdiction, who was the proprietor of the slave.

(15) Ducange v. Herimanni, T. 3. p. 1119. infr.

(16) Muratori ant. It. T. 1. p. 745. A. and 746. D.

(17) Muratori, l. c. p. 732. E.

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so as Judicators in a Placitum at Teramo, A. C. 1056. (18).

Under the name of Germans.

The Freemen, under the name of Germani, are probably mentioned as Judicators in a great many deeds, where their presence has never been even suspected. That designation is frequently used, in deeds of the middle ages, to denote merely Brothers-German, or brothers descended from the same father and mother. This is often placed beyond all doubt, by the mention of the common father; (19) but, Germanus is employed so repeatedly, and so combined with other appellatives, that we are almost unavoidably led to regard it, as denoting a particular class of society. On account of this very ambiguity, the insertion of the common father became necessary, when Germani signified Brothers: and, precision could not be given to its second meaning—of members of a particular order, without the addition of the domicile or residence. In the following passages, the last signification is intended; and this distinction is generally found, when the Germani acted as Judicators, in the decision of processes.

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(18) Ughelli, T. 1. p. 352.

(19) Ughelli, T. 1. p. 1436. "Hugo vicecomite et Guidone germanis, filiis bonae memoriae Guidonis et Albertae de Montegrabbo." add. ib. p. 1435. 806. Sometimes also, Germani stands for Consobrini: Tiraboschi Storia di Nonantola, T. 2. p. 147. 152.

An imperfect deed of Nonantola, about A. C. 872, mentions the following persons as present: "presencia bonorum hominum qui subter leguntur, id est Walde ... (sic) cives regienses .... Lupicino, Dando scavinis de solaria ..... scavina de sorbaria, Trasemundo, Petrus, Johannes germani de Sorbaria." (20) In a Placitum at Pavia, A. C. 945, there appear as Judicators, Judices regum, notarii sacri palatii, and finally "Theudaldus, Ingo, et Amelbertus, Adelbertes, Aldo germanis de loco Castarno." (21) A Placitum held in the Mantuan territory, A. C. 898, is in this point of view still more remarkable. It was attended by a great number of Judicators. Among these, we find "dagipertus et teccelinus germanis et leo de meruda et recuino germanis .... totile et eribertus germanis .... Lederado filio raguerio, Warnerio filio .... Adelperto ... germanis ... johanne .. adeperto germanis de parma, Ado et Johannes germani de budrio, Benno et Azo germani denandre ... Berno et Eberardo germanis de remo .... et reliquorum bonorum hominum circum adstantibus." One of the subscriptions is "Sign. ma. Lederado de regien. genus Ari-

(20) Tiraboschi Storia di Nonantola, T. 2. N. 43. p. 57.

(21) Tiraboschi, l. c. N. 87. p. 117

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mannorum qui ibi fuit." (22) Here the term Arimannus is applied to the same Lederadus, who had been formerly designated by Germanus; and both expressions appear to be perfectly synonymous. Besides, it is extremely improbable, that such a number of brothers could have been assembled together as Judicators, without mention being made of the common father, while the residence of most is given. In like manner, the judicial functions, in a Placitum at Milan, A. C. 892, are discharged by "Ursepertus et Ragifredus judices domni Imp. Rotpertus Ragibertus . . . judices ipsius civitatis Mediolanensis, Petrus et Ludelbertus germanis de Gratis . . . Stadelbertus judex de Curugo, Asimundus . . . notariis et reliqui multis." (23) Among the Judicators in Parma, A. C. 906, there were "Adelbertus . . . Scavinis, Oberto . . . vassis, . . . Ramberto de Tuliore, Autecherio de Pezenano, Ansprando et Aldeverto germanis de Fleso, Gariverdo, Roitichildo germanis, Bernardo . . . notariis, et reliquis multis." (24) In Lucca, A. C. 847, it is said, "essentque nobiscum Cuniperto Vassu domni Imp., Wichelmo . . . . Hildiprando, Sichiprando germanis, Arochisi, Angalperto germanis;

(22) Tiraboschi, l. c. N. 56. p. 74. 77.

(23) Fumagalli cod. dipl. S. Ambr. p. 522.

(24) Muratori an It.t. T. 2. p. 936. D.

and, in the same place, A. C. 873, several Vassi and many Germani were present as Judicators. (25) These examples from Lucca are of the more importance, because, in that very city, and at a period not much earlier, Haremanni are mentioned as Judicators. (25a) Towards the middle of the ninth century, there appeared in a process at Milan—"Ragipert diaconus de Retzano cum Melfrit germano et advocato suo." (26) Here, indeed, Melfrit and Retzano may have been brothers; but, the much more probable meaning is—"with the freeman Melfrit, his guardian:" because, it is very common in deeds, when noticing these advocates of churches and clergymen, to express also their rank, and the office which belonged to them. (27) These proofs may suffice on this subject; but, similar examples occur, in abundance, from the eighth to the twelfth century. (28) In these passages, Germanus has not merely

(25) Muratori, l. c. T. 1. p. 527. A. & 503. D.

(25 a) See above, p. 179.

(26) Fumagalli, l. c. p. 222.

(27) Fumagalli, p. 375. "Una cum Jordannis scavinus, avocatus ipsius Monasterii:" and ibid. p. 522. "Ambrosius Judices ipsius civitatis et advocatus ej. Monast. Nec non Gariprandus scavinus . . . et advocatus eccl. S. Johannis." See also Muratori antich. Est. P. 1. p. 134. 151. 155. 159. 170. 172. and Hallam's Middle Ages. i. 214. London, 1826, 8vo.

(28) Ughelli, T. 10. p. 262.—Muratori ant. Ital. T. 4

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the same signification with Arimannus, but is only a different mode of forming and pronouncing the same word. Arimannus is often variously spelt in manuscripts and deeds; thus—Erimannus, Eremannus, Haremannus, Herimannus, Herman, etc.; as must have been observed, from the examples already given. Herman and German are in fact the same word; and, in the Spanish language, to this day, the brother is called—Hermano. How, the national name of the Germans came to be connected with this etymology, shall be, afterwards, shown.

The Freemen also occur as Citizens.

4. The citizens were called Arimanni; for, they also were freemen. Thus, the Bishop of Lucca, A. C. 819, appoints a parish clergyman, "una cum consensu sacerdotum et Aremannos hujus Lucanæ civitatis." (29) This use of the term Arimannus occurs, much more frequently in Mantua, during the ele-

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p. 9. (two deeds) T. 5. p. 311.—Muratori antich. Est. P. 1. C. 16. 18. 19. 20. 32. (p. 172. 193. 210. 215. 366.)—Fumagalli, p. 485.—Tiraboschi Storia di Nonantola, T. 2. p. 21. 39. 61. 62.

(29) Muratori ant. It. T. 1. p. 747. D. The above authorities, where Germanus occurs, with the addition of the place of residence, are in a certain degree proofs of the same fact. We must also view, in the same light, the following passage from a deed, A. C. 715, if its authenticity were not somewhat doubtful—"per singulos Arimannos ipsius Senensis civitatis." Grandi ep. de Pandectis, p. 104. infr. Florent. 1727. 4to.

venth and twelfth centuries; and, of this fact we shall immediately avail ourselves, for another purpose. The signification of Arimannus, however, underwent important changes. The earlier the notice, the more certainly does it refer to the free Lombard alone; but, when the nations became subsequently blended together, and the recollections of individual disent were lost, the general idea of complete personal freedom may have been all that remained of its original meaning. When, therefore, in the later centuries, citizens are styled Arimen, it would be scarcely accurate to understand the term as signifying Lombards exclusively. The expression must then be taken in its extended meaning, as descriptive of all the members of the civic community, even, when not a few of these were Romans.

The Freemen of a District were called Arimannia.

5. Arimannia signifies the whole body of Arimen, united in a district, or in any other association: "Fidelis noster veniens ibi in palatio nostro una cum Arimannia sua. (30) This is, perhaps, the only passage, in

(30) Marculf. 1. 18. (Canc. ii. 201). According to Eichhorn's remark, indeed, (Deutche Rechtsgeschichte, Th. i. §. 47. note e,) the individuals, here meant, are not the freemen of a district, but the followers of an Antrustio; for, the Antrustio, to whom the formula refers, comes for the purpose of swearing "trustem et fidelitatem" to the King; not an appropriate errand for the old class of freemen.

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which the Arimen are directly mentioned, out of the Lombardic empire.

And Free Property bore the same name.

6. Free property, in opposition to perpetual leases, feus, &c., is called Arimannia in the same manner, as the Roman rights of property are said to arise, ex jure Quiritium, and made to depend upon the personal condition of the Quirites, who, in early times, were alone capable of enjoying the full dominium. The strongest authority, on this subject, is a judicial examination of witnesses, A. C. 1182, in a process of the Pope with the Bishop of Ferrara: "De Glazano interrogatus dicit, quia partim est Arrimannia et partim Empheteusis. Pro Arrimannia debent facere servitium domini Papae, sive sit habitator Episcopi, sive alterius; videlicet quod pro Arrimannia debent recipere Comitem bis in anno, et unaquaque vice dare duos pastos. Et ibi dabet tenere placitum generale tribus diebus. Et si aliquis Arimannus distulerit venire ad placitum usque ad horam tertiam, debet solvere pro banno centum et octo Blancos. Si habitat super Arrimanniam, omnem districtum (all the fines arising from the punishments) habet Comes." (31) There are also several deeds of the eleventh and twelfth centuries, in which the Emperors confirm to the Arimen, or the whole Burgesses of Mantua, their rights and liberties.

(31) Muratori, l. c. T. i. p. 725. D.

(32) In the fourth of these, A. C. 1133, this guarantee is expressed in the following terms:—"Sub hujus confirmationis sententia . . . comprehendimus Arimanniam cum rebus communibus." In the second, A. C. 1055, the language employed is, "Vel de Eremania et communibus rebus;" and, in the third, A. C. 1091, it is said, "Vel de Hermania et rebus communibus." A question might arise, concerning the import of Arimannia in these examples; but, the phraseology of the fifth deed, A. C. 1159, which is obviously intended merely to repeat and confirm the others, removes all doubt on the subject. "Cunctos Arimannos in civitate Mantuae .... cum omni eorum hereditate, et proprietate, paterno vel materno jure, et cum omnibus rebus communibus." The meaning, therefore, of all these Charters is, that the Mantuans shall be secured, in all their rights, including both the private property of individual citizens, Arimannia, and the goods of the community.

7. Finally, Arimannia signifies certain taxes. In the National assemblies, every freeman was compelled to serve at his own expense; but,

Certain Taxes on the Freemen, were also styled Arimannia.

(32) The five deeds of the respective dates, A.C.1014, 1055, 1091, 1133, 1159. are contained in Muratori, l. c. T. 4. p. 13. 15. D. 17. D. T. 1. p. 729. D. 731. C.—A similar charter for Mantua from Matilda, and Guelf V. of Bavaria, her second husband, A. C. 1090, is also given by Muratori Antich. Estensi P. 1. C. 29. p. 323.

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in order to provide for certain general wants, it became necessary to give a contribution in money to the Count; and, from this, gradually arose a permanent tax. To the same purpose was also, undoubtedly, applied the produce of those fines, which were not levied as a compensation to the injured party. The sum total of all these money exactions, paid by the freemen to the old national magistrate, was called Arimannia; and was thus distinguished from the contributions paid to the owners of the bondmen, and the proprietors of the land. When the old nation disappeared, and all the original relations became involved in confusion, this Arimannia was treated as ordinary private property, and was largessed, sold, or granted in feudal tenure. (33) The property of churches and cloisters was frequently declared free, from fodrum, arimannia, etc.: that is, their estates were exempted from the ordinary burdens of free landed property. (34) In other cases,

(33) Möser Osnabr. Gesch. Th. 1. Abchn. 5. §. 39. He speaks, however, oft he national army tax only, (compare Th. i. abschin. i. §. 20. 21.) and not of the fines arising from punishments.

(34) See the deeds in—Muratori ant. It. T. 1. p. 733. (a. 1177).—Ducange, T. 3. p. 1121. med. (a. 1156).—Fantuzz monum .Ravennati, T. 1. p. 209. 275. (a. 981. 1037).—Arimannia occurs very frequently as a tax, in the Liber Censuum Ecclesiae Romanae of the twelfth century, contained in—Cenni monum. dominat. pontificiae, T. 2. p. xxxvi.

the Arimannia was granted as a fief; thus, A. C. 1070, to a Bishop is given :—" Casale cum Arimannia, et cum servitio, quod pertinet ad comitatum; Odalingo cum omnibus Arimannis, et quod pertinet ad comitatum," etc.; (35) and, in the same sense, the Emperor Frederic I. properly includes the Arimannia among the Regalia of the Lombardic Crown, and even enumerates them before all the others. (36) Likewise A. C. 901, the grant of a Corticilla is confirmed cum reditu liberorum hominum. " (37) The strongest example of this meaning of Arimannia, although the term itself be not employed, is in a feu-charter, A. C. 938: —" Insuper concedimus eidem . . . ut de villa, quae vocatur Roncho, et de omnibus Arimannis in ea morantibus, omnemque districtionem omnemque publicam functionem et querimoniam, quam antea publicus nosterque missus facere consueverat :... custodiant et observent." (38) The following remarkable passage is taken from a diploma by

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Thus—" Romana ecclesia debet habere . . . . . totam Arimanniam masse fuscalie. Et totum publicum ejusdem ;" and the same in many other districts.

(35) Muratori, l. c. T. 1. 737. E.

(36) II. Feud. 56. " Regalia : armandiae, viae publicae, flumina navigabilia," etc.

(37) Muratori ant. It. T. 1. p. 741. C.

(38) Ducange, T. 3. p. 1120. supr.

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Frederic I., A. C. 1179, in favour of the Bishop of Feltre: (38 a)—" Addentes etiam precipimus, ut nulli unquam persone liceat aliquo tempore terram Hermanorum emere vel violenter auferre. Et quis terram Hermanorum comparaverit, unde Ecclesia Hermaniam perdiderit, potestatem habeat Episcopus eam recipere, unde Hermania publica functio exire solebat." The Bishop had acquired the office of Count; and the adjoining great feudal nobility had been attempting to unite to their own feudal possessions, by purchase or by violence, the property of the Arimen, and thus to withdraw from the Bishop, as Count, the payment of the old contributions or Arimannia. The above clause is directed against this practice. Other deeds contain examples of the Arimen themselves being claimed, donated, or given in feudal grant. (39) A Church Council, A. C. 904, found it to be a matter of particular importance, to prohibit the Counts from making such grants, and ordained:—"ut nullus comitum Arimannos in beneficio suis hominibus tribuat." (40) Arimannos is here a figurative expression; for, the Arimen

(38 a) Verci Storia della Marca Trivigiana, T. I. Venezia, 1786, 8vo. documenti, Num. 23.

(39) Fantuzzi monum. Ravennati, T. 5. p. 268. 269. See above, p. 177., the deeds of Otto I. and Henry IV.

(40) Concilia ed. Mansi, T. 18. p. 227.

themselves were free, and subject to no alienation. It is used on this occasion, to denote the Arimannia levied from the Arimen, or the money contributions which they paid, as a remnant of the old constitutional practice, to the Count, the Missus, or the King himself. This expression, however, occurring in many deeds, has led modern authors to maintain—that the Arimen, the old freemen, and true rulers of the country—were persons who lived under a species of bondage!

The term Ariman is derived from Ehre, dignity.

Concerning the derivation of the term Ariman, two very obvious roots are presented to our consideration. These are Heer, army, and Ehre, dignity. (41) By the first, they are the Heermen, or soldiers of the national army, (42) and this is undoubtedly true of

(41) On the second root, see—(Fulda,) Sammlung und Abstammung Germanischer Wurzelwörter, edited by Meusel. Halle, 1776, 4to, §. 152. N. 3. S. 239. and §. 210. N. 11. S. 309, (among others, the Anglo-Saxon word *are*, "honour.") On both roots, consult—Wiarda, über deutsche Vornamen und Geschlechtsnamen, S. 46. Berlin, 1800, 8vo, where the family names—Hereman, Herman, Armin, are derived from the old title of the Lombardic Freemen. If the root of the term—Arimann could be connected with Fara, the family, (L. Long. Rotharis 177, (Canc. i. 76.)—Paul. Diac. II. 9.—Gibbon, chap. XLV. note second r.), the Lombardic Arimen would be the same with the Burgundian Faramen. L. Burgund. T. 54. §. 2. 3. (Canc. iv. 29. infr.)

(42) The Arimen were not, however, the Generals, as

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the Arimen. Since, however, in the formation of every language, the natural course is to advance from simple to complex ideas; and since, the terms Heer, exercitus, Armée, army, &c. plainly belong to the latter class of expressions, this derivation has the appearance of being too remote and artificial. According to the second root, the Arimen are the Ehremen, not from their personal honour or individual dignity, but, in Möser's sense, from the full capacity of acquiring all the national rights and privileges, Caput, with which, indeed, rank and honour are kindred conditions. The preference seems to be due to this last derivation, because, in many quotations, women are called Arimannae, (42 a) which is at variance with the obligation of service in the army, and, on account of an im-

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Müller asserts. He maintains them to be the same, not only with the Swiss-Landamman, but with the Cossack-Ataman, (Schweizergesch. B. I. C. 15. n. 30.) Still more erroneous is his account of the Lombardic constitution, in the Allgem. Geschichte, Buch XI. cap. 2, or Band. ii. S. 17. Ed. Tübingen, 1810. There was, it is said, in each district, during the time of war, a Heermann or Amman, (Ariman) and, for the civil business, a Judge—Schuldais. Over several of these military commanders and magistrates, the Count presided; over the Count, the Duke; and over the whole, the King.

(42 a) See above p. 176. infr.

portant analogy in the constitution of the Franks—to be immediately noticed.

The Arimen are misunderstood by Ducange, Muratori, Sismondi.

In modern times, the Arimen have been frequently misunderstood, and the principal causes of error have been already mentioned. Ducange gives his reader the choice of considering them, either as a very inferior order, or as vassals. (43) Muratori, at first, explains them correctly as freemen, and derives their name accurately from Ehre; afterwards, however, he perplexes himself with endless doubts, and states them to have been either vassals, or proprietors of a certain species of socage lands—Bauergüter, or noblemen, or dignitaries of the empire. Finally, he declares his total inability to come to any certain conclusion, but ventures, safely enough, to differ from those authors, who consider them to have been bondmen. (44) Sismondi, also, has quite mistaken the condition of the Arimen. He maintains that they were the free peasantry,—who, besides their own lands, cultivated, as farmers, the estates of the great. And he adds, that the people of this class and the noblemen, were the only individuals obliged to attend the Placitum of the Count. (45)

(43) Ducange v. Herimanni, T. 3. p. 1119.

(44) Muratori ant. It. T. 1. Diss. 13; particularly, p. 715—716. 748—750.

(45) Sismondi, Rep. Ital. T. 1. Ch. 2. p. 78 supr. Paris, 1826, 8vo.

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By Liruti.

Liruti (45 a) considers the Arimen as a middle order, between freemen and bondmen: "ut servitutis cujusdam honestioris jugum portaverint;" and afterwards states them to be common vassals, who, as their feudal service, were bound to defend the castle of their superior. Both of these views have been occasioned by mistaking the subsequent degeneracy for the original condition of the order. Pursuing the same train of error, Liruti adds, that the Arimen of the Courts were not Judicators but armed officers, forming, as it were, a body-guard to the liege lord of the jurisdiction. Notwithstanding these errors, this author has collected from deeds much important information. Thus, at a Placitum, A. C. 1419, lands are alienated in the presence of many persons therein named: "Omnes homines Armani Domini Patriarche." And although the Arimen are not mentioned at another Placitum or Playtum, A. C. 1551, the same procedure is followed. These prove the continuance of the old mode of transferring the rights of true property, before the free community of the district, down to a late date. In one of them, indeed, the Arimen are expressly noticed. Liruti asserts, that the Arimen still continued in Friuli;—"ubi adhuc Armanniæ quædam vi-

(45 a) Jo. Jos. Liruti de Villafredda de Servis medii ævi in Forojulii, cap. 4. p. 33–49, Rom. 1752, 8vo.

gent;" although it cannot be gathered from these expressions, whether he alludes to the endurance of their particular rights, or to the continuance of their name (45 b). The superscription of a deed, A. C. 1280, is also highly deserving of attention. "Terminatio quod Glemonenses vocati Arimanni seu Edelingi non graventur ultra quam pro CL. libris facta in 1280, 4 Julii." The Arimen, or freemen, and Edelingi, are here placed on the same footing, like the Saxon Frilingi and Edhilingi in Nithard; and this affords one of the strongest proofs of the accuracy of our explanation of the term Arimannus.

Klüber (45 c) maintains essentially the right opinion, of the Arimen being freemen, and of their rights in the land being true proper- And by Klüber.

(45 b) See also Liruti, Notizie delle cose del Friuli, tomo 4. p. 110–112, in Udine, 1777, 8vo. In this work he repeats, with greater precision, his former opinions, and declares the Arimen to have been, at first, proper bondmen, who forsook their estates, which were afterwards given to freemen, without changing their old name and villein quality. He also states distinctly, that the title still exists in the form of—Ermann, Ermanns. Giacchè in questa provincia vi rimane ancora in qualche luogo questo nome in certa corrisponsione di Formento, vino, ed altro .... noi nel nostro Dialetto li chiamiamo Ermann, e nel numero di de' più Ermanns. p. 111. See also below, n. 57 a.

(45 c) Jo. Lud. Klüber de Arimannia Comm. 1 et 2, p. 5–45. Erlangæ, 1785, 4to.

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ty. With some of his other doctrines, it is impossible to agree. He, like many others, derives the term from Heer, and views the Ariman, consequently, as a soldier. Klüber farther considers the Arimen to be an order peculiar to the Lombards, and disbelieves the connexion which they are supposed to have had with the Heerbann: since that institution he argues, existed among the Franks alone, in the same way as the Arimannia among the Lombards. Both of these doctrines are erroneous. Another hypothesis maintained by this author is, that, among the Lombards, the freemen of each district were bound together, by particular associations, for the purpose of mutual defence, principally against the Romans; and that these confederacies were called Arimanniæ. This assertion, also, is unsupported by any historical evidence, and is at variance with the established meaning of the term. Another mistake made by Klüber yet remains to be noticed. He asserts, that these Arimanniæ were attacked by their covetous and powerful neighbours, and that their free estates were subjected to all kinds of arbitrary burdens, such as ground-rent, indefinite contributions, feudal services, &c. There are, however, no authorities in support of this opinion; although it cannot be denied, that the

taxation, paid by the Arimen, was applied quite contrary to the meaning of the old constitution, and that the right to levy it had become vested in individuals by sale or donation. But no new burdens were created, and arbitrarily imposed upon the Arimen. On the contrary, every subsequent demand stood in a certain definite relation to those old taxes, which the freemen were bound to pay for their true property to the King or to the Count. (45 d)

(45 d) Some deeds, although of a later date, explain the similar use of the term Arimann in Germany, and are too remarkable to be omitted. Thus an Alsace deed, A. C. 1419, contained in Scherz glossar. p. 59, mentions, "Werner Rasser von Scheffelingsheim, Armann of the Empire:" and, immediately afterwards, the same description is repeated. Klüber (p. 6.) proposes to read Ammann, and Scherz explains the term by Colonus. Both are mistaken. In another deed, A. C. 1406, (Scherz, p. 60,) it is said, "and had taken one of their Armann called Wölfelin." Meusels, Geschichtforscher, Th. 2. S. 297, notices a deed, A. C. 1396, in which complaint is made that "Hinz Conr. Klingenfelss had beaten severely his Armann, Conrad Zyenbach." That the individuals here called Arimen belonged to a certain class, is plain from the Lombardic laws and deeds formerly quoted, (p. 178–190.) The expression "Arm leute" occurs still more frequently, and seems, therefore, to require explanation. In Meusels Geschichtforder, Th. 7. S. 219. (A. C. 1364.) we read, "his servants, citizens, and Arm leute." See also the same work, S. 228. 235. (A.C. 1401. 1414). And as that term, both here and in other passages, is descriptive of a class, it must be considered

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The Frank Rachinburgers were the same with the Lombardic Arimen or Freemen.

We may now proceed to examine the condition of the freemen among the Franks. The well known class of persons, called Rachinburgi, among that people, were precisely the same with the Lombardic Arimen,—the old free-fellow-countrymen of the conquerors. The term is commonly understood to signify a particular class of elected judicators. No such order existed in the early times, and all the freemen, without distinction, possessed the right of administering justice, as shall be afterwards shown. That the Rachinburgers could not possibly be such a limited order, and that the freemen were styled Rachinburgers; even when not exercising the particular functions of judicators, may be proved at present.

The Rachinburgers were not a peculiar order of elected Judicators.

Most passages, in which the Rachinburgers occur, may be explained in favour of both opinions; since, they in fact do nothing more than prove, that the name—Rachinburgi is applied to judicators. Thus, "siquidem Rachinburgii in mallo residentes ... legem

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as originating merely in an erroneous conception of the etymology of the word Armann. The principal reason, in support of this opinion, is contained in the deed, A. C. 1406, just quoted from Scherz; where the same Wölfelin is first called Armann, and immediately afterwards it is said, "to deliver the Armen Mann again to his jurisdiction." The necessity of a particular examination of these passages, was first suggested by a perusal of Klüber's book.

dicere noluerint," (46) is totally devoid of precision. The Rachinburgers may be here, according to our opinion, the freemen generally, the—Arimen; and the circumstance of their being employed as judicators, may depend upon the addition of the words—in mallo residentes; or, the exercise of judicial functions may be denoted by the word Rachinburgi alone, even on the supposition, that all the freemen possessed the right of attending the courts; or, lastly, the word may signify a limited body of the people, forming an order of elected judicators. But other passages bear more directly on the point; and the following satisfactorily prove, that the Rachinburgers were not a peculiar and exclusive order of chosen judicators. In a precedent for recovery of a debt, it is said: "Tunc Grafio congreget secum septem Rachinburgios idoneos." (47) The addition of this ad-

(46) L. Salica emend. T. 60. §. 1. (Canc. ii. 151.) Similarly indefinite passages may be found in—L. Salica emend. T. 59.—L. Ripuar. T. 55. (Canc. ii. 310).—Appendix Marculfi, C. 4. (l. c. 249.)—Formulae Bignon. C. 26. (l. c. 276.) —Form. Mabillonii, C. 49. (Canc. iii. 478.)—Capit. a. 755. Art. 29. and a. 757. Art. 9. (Baluz. i. 176. 180.) and in —an old Chronicle in Bouquet, vii. 227.

(47) L. Salica emend. T. 52. §. 2. (Georgisch. p. 108, med. or Canc. ii. 148. supr.) and in the Paris Manuscript, T. 85. (Canc. v. 389. med.) The adjective "idoneos" is omitted in the L. Salica antiquior, T. 53. §. 3. (Georgisch, p. 107.) and in the Wolfenbüttler manuscript, T. 51. (Canc. v. 404. 2. col. med.)

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jective is in favour of our theory; since, each judicator of a specially chosen order must have been idoneus; although the proper degree of qualification might not be found in all the freemen. Two passages, from the same collection of forms, (48) are equally evidence of the accuracy of our view. The one says, "in mallo publico ... praesentibus quampluribus viris venerabilibus Rachimburgis qui ibidem ... residebant vel adstabant." In the other, it is narrated, "in mallo publico ante illustri viro illo comite vel aliis quamplurimis personis ibidem residentibus .... Et dum haec causa apud ipso comite vel ipsis Racimburgiis diligenter fuit inventa ... propterea taliter ei fuit judicatum ut de hac causa notitiam bonorum hominum manibus roboratam eum accipere deberet..... His praesentibus qui subter firmaverunt." The expression Quampluribus, of the first formula, refers plainly to the general body of freemen, and not to a particular order of elected judicators. The same is true of the second quotation; for, the Quamplurimae personae, the Racimburgii, the Boni Homines, and the subscribing Praesentes, are all the same persons. Of the Boni Homines, we shall afterwards speak.

(48) Appendix Marculfi, cap. 6 and cap. 1. (Canc. ii. 249. med. and 246. infr.)

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Another proof of the accuracy of our doctrine is found in the beginning of the deed, concerning a Placitum, held at Ausonne, in the Bishopric of Carcassone, A. C. 918: (49) "Cum in Dei nomine resideret Aridemandus (al. Ardemaldus) episcopus sedis Tolosae civitatis .... una cum abbatibus, presbyteris, judices, scaphinos (al. scastrinos,) et regimburgos, tam Gotos quam Romanos seu etiam Salicos .... id est Donadeus monachus, ... Adalbertus, Jodolenus, Donatus, Rumaldus, item Donatus judices Romanorum ... (four persons) judici Gothorum .... (eight persons) judices Salicorum. Sive et in praesentia Autario (then other sixteen persons,) Salvardo sagione, et aliorum plurimorum bonorum hominum qui cum eos residebant in mallo publico," etc. This deed is quite decisive of the question. At the time of its date, a limited order of elected judicators had been long introduced, under the synonymous names of Scabini, or judices. The judicators are first generally described as judices or scaphini, and—regimburgi. These orders are taken from the three different nations, who occupied the country. Then, follow the names of eighteen Scabini or judices; and, after these, sixteen other persons, besides the bailiff,

(49) (Vaissette) hist. de Languedoc T. 2. preuves p. 56. N. 42. Gallia christiana T. 13. Instr. p. 2.

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or messenger of the court: and, finally, "et alii plurimi boni homines." The Regimburgi are therefore evidently different, from the Scabini or elected judicators, and synonymous with the boni homines, whose names are partly given. Thus, the Rachinburgers are merely the free compeers of the great national confederacy.

The freemen were called Rachinburgers even when out of Court.

Keeping in mind, therefore, that the Rachinburgers were not elected Judicators, like the Scabini, we may proceed to inquire, whether the freemen among the Franks were ever styled Rachinburgi, unless when exercising the peculiar functions of Judicators. There is no sufficient evidence for maintaining this restricted acceptation of the term. It is used in many cases, where there were no judicial duties to perform. Thus, the Salic law requires the Count to take with him seven good Rachinburgers, not for the purpose of pronouncing a decision, but of enforcing obedience to the Law. By the Ripuarian ordinances, sometimes three, and at other times seven Rachinburgers, are required, as compurgators. (50) The Rachinburgers appear also as witnesses, to an act of tradition, in a Fuldensian deed, A. C. 783. (51)

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(50) L. Salica emend. T. 52. §. 2. (Canc. ii. 147.)—L. Ripuar. T. 32. §. 2. 3. (ibid. 305.)

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The Boni Homines and the Rachinburgers are the same.

Several of the above quotations, where the term is used as synonymous with Boni Homines, throw a new light upon the condition of the Rachinburgers. The former expression is used much more frequently than the latter, but always denotes the same relations. The boni homines are most commonly found as Judicators along with the Count, or with the President of the Court. They are very often mentioned in that situation, in the collections of Forms, (52) and in deeds regarding actual lawsuits. In the Processes, they occur repeatedly alone; but far oftener, in conjunction with the Scabini, as shall be afterwards shown, when treating of the Judicators. The Scabini are moreover as clearly distinguished from the Boni Homines, as from the Rachinburgers. Besides occurring in Processes, the Boni Homines are mentioned

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(51) Antiq. Fuldens. L. 2. trad. 40. in Pistorii script. rer. Germ. ed. Struv. T. 3. p. 562. "totum et ad integrum tradiderunt coram testibus *et regenburgis.*" Then follow many subscriptions, without any distinction between the different classes of witnesses.

(52) Marculf. II. 9. princ. (Canc. ii. 228).—Appendix Marculfi C. 22. 29. 32. 33. 34. (ibid. 256–260.)—Form. Sirmond. C. 30. 31. (Canc. iii. 445. 446.)—Form. Bignon. C. 7. 8. 13. (Canc. ii. 271–273.)—Form. Mabillonii, C. 46. (Canc. iii. 478.)

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as mere witnesses to Traditions, Manumissions, &c.; (53) and must therefore be the freemen generally, for the same reasons as were employed successfully to prove the

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53) As witnesses—to a donation, tradition, &c. in Marculf I. 33. II. 38. (Canc. ii. 212, 242.)—Appendix, Marculfi, C. 19. 21. (ibid. 256); and—to a manumission, in Append. Capit. III. a. 803. (Baluz. I. 395. med.)—L. Long. Ludov. Pii 6. (Canc. i. 184.) It is of importance to compare Marculf. i. 33. with i. 34.; since, both passages refer to the same case, and the witnesses, styled in the one, Boni Homines, are called in the other, Pagenses, i. e. freemen of the district; which is therefore the signification of boni homines. In the same sense, pagenses often occurs in the Capitularies. Baluz. I. 485. 486. 495. See also below, n. 160. It must not however be concealed, that the expression boni homines is found in many passages, and particularly in donations to churches and monasteries, without any technical or legal meaning, and merely in its literal signification—of upright benevolent people. Thus, in Bouquet, T. 5. p. 722. B. & D. 733. D. & E. 748. B. and Tome 6. p. 478. D. 465. B. The freemen or boni homines are also met with in the German, 'Gute Männer.' Thus, in J. A. Bolten Ditmarsischer Geschichte, Th. 2. S. 446. Flensburg and Leipsic, 1782, 8vo, the following passage is given from an unprinted chronicle. "A. C. 1404, the high born Prince, Lord Gerhard, son of the Iron Henry, Duke of Schleswick, Count of Holstein, and Stormarn, assembled his noblemen, knights, bondmen, Guden manne, magistrates, and councillors from the cities," &c. Now, the 'Guden manne,' i. e. the mere freemen, are here the remains of the old National Communities, and are distinguished, as members of a separate order, from the noblemen, knights, bondmen, and citizens.

meaning of the term Regimburgi. Since the Rachinburgers and the Boni Homines are identical, not merely in the written memorials of the same tribe of Franks, but in the same author, and in the same passage, the latter may, with certainty, be viewed as the Latin translation of the former. The circumstance of all forms and deeds having been written in Latin, is the reason why the original term Regimburgi is of such rare occurrence, and has been so completely supplanted by its Latin synonyme. Bonus Homo is obviously the literal translation of Arimann, and this coincidence serves, in a great degree, to confirm all our preceding remarks —regarding the Rachinburgers and the Boni Homines—and the identity subsisting between them.

The term Rachinburg is derived from Rek, great.

This intrinsic coincidence leads also to an etymological explanation of the word Regimburgi. Most authors refer that term to Racha, a process or lawsuit, or to Recht, law. This root always suggests the erroneous idea of the Rachinburgers being necessarily Judicators, and we therefore prefer Müller's proposed derivation, from—"Rek" great, noble, excellent, as the source from which it may, with the greatest probability, be deduced. (54) This

(54) J. Müller, in his Schweizergeschichte, B. I. cap. 10. n. 33., refers to the Spanish "ricos hombres," as preserving the original meaning of the term, and as signifying—dis-

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origin also illustrates the close and almost verbal analogy between Bonus Homo and Arimann. The orthography of the different manuscripts seems rather to favour this derivation, as the following varieties show: Rathimburgii, Rachimburgii, Racimburgi, Racineburgi, Recyneburgi, Racimburdi, Regimburgi, Raimburgi.(55) Burgi, the second part of the word, shall be afterwards explained, from the Anglo-Saxon Friburgi. (55 a) The appellations of Regimburgi and Boni Homines, are peculiar to the Franks; and the second, in particular was

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tinguished or illustrious individuals. In the (Fulda) Sammlung and Abstammung German. Wurselwörter §. 60. S. 119. "Rek" is translated by—heros, magnus, eximius. See also Wiarda über deutsche namen. S. 42. The following passages likewise confirm this derivation: (a) "les Barons et les autres riches hommes," from chap. 5. of the assises de Jerusalem. ed. de La Thaumassiere, translated (Canc. v. 145. supr.) by grandi homini in the Italian version. (b) Ricchi homini et altri cavaglieri," from the preface to a small treatise in Canc. v. 305. supr.—Compare also Ducange's notes on Joinville, p. 51. Paris 1668, and the authorities there quoted.

(55) Rathimb. in L. Sal. antiqu. in Georgisch.—Rachimb. in most passages: e. g. in L. Sal. emend. also in Georgisch.—Racimb. Racineb. Recyneb. in other MSS. of the L. Salica in Canc. v. 389, 390. 404. 405. and Ducange, V. 1089, and Form. Bignon. C. 26. (Canc. ii. 276.) Racimburdi in Form. Mabillonii C. 49. (Canc. iii. 478.) Regimburgi in the Placitum, A. C. 918, and in the Fuldensian diploma. (See above, p. 201, and n. 51.)—Raimburgi in the Chronicle in Bouquet VII. 227.

(55 a) See below, p. 211.

first introduced by them into Italy, where we shall afterwards have occasion to notice it.

The Frank nobility became Antrustions after the Conquest.

While the Lombardic and Frank orders of freemen have been thus found in possession of certain distinct characteristics, there are no traces existing of the similarly old and well defined caste of nobles among the latter people. This difference is sufficiently explained by the circumstance of the Frank nobility, about the time of the conquest of Gaul, having surrendered their independent dignity into the hands of the King. By becoming Royal retainers, their existence, as an old national order, ceased, and they were henceforth classed among the Antrustions, or principal liegemen. (56) Many have erroneously maintained, that the Franci were the nobility of the Franks. (57) But that term, in all

(56) Möser Osnabrück, Gesch. Th. 1. Abschn. 3. §. 40. note b.—Eichhorn deutsche Rechtsgeschichte, Th. 1. §. 47. Hallam's Middle Ages, i. 157. London, 1826, 8vo. Gibbon's Rom. Emp. c. 38. note e.

(57) This opinion is adopted by Von Schlieffen, in his Nachricht von dem Pommerschen Geschlechte der von Sliwin oder Schlieffen, S. 12. 25. 1780. 4to.; and two reasons are brought forward in support of it:—(1.) The Franci are rated at the same composition with the Saxon nobility; but Möser, l. c. explains this circumstance very satisfactorily, by the comparative scarcity of money among the Saxons. (2.) The composition for homicide in Capit. III. a. 813. art. 2. 3. (Baluz. i. 511).—"Qui hominem Francum occiderit, solidos sexcentos componat .... Qui hominem ingenuum occiderit, solidos

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our authorities, is used either as the general name of the people, or as the particular appellation of the freemen.

But the old nobility of the Lombards survived that event.

The old national nobility of the Lombards is expressly mentioned by Paul Diaconus, who says of several of their kings, "Hi om-

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ducentos componat." But, art. 8. says—"Si quis Wargengum (a foreigner) occiderit, solidos sexcentos . . . componat." Now, it is utterly impossible, that the foreigner should have been valued at a much higher composition than the freeborn Frank. The ingenui, therefore, rated at 200 solidi, are the Romans; and then it becomes quite conceivable, that the foreign Germans might be favoured with a higher composition than the Romans, and even with one equal in amount to that of the Franks. Upon the same principle, we are enabled to explain, art. 6.: "Comes . . . sicut sua *nativitas* est." This does not signify, as has been maintained without a shadow of probability—'according as he was free born or manumitted;' for, nativitas has here its ordinary meaning, and the quotation must be translated—'according as he was Frank or Roman.' Throughout the whole passage, (art. 2. 3. 4. 5.) the third to be paid, as fredum or in dominico, must not be reckoned over and above the principal sum, but must be included within it. Thus, for the slain *lidus*, or bondmen, not 100 first, and then $33\frac{1}{3}$ more as fredum; but, 100 altogether; and, of that sum, $66\frac{2}{3}$ as private compensation, and $33\frac{1}{3}$ as fredum. Hallam. (Midd. Ages, i. 232. London, 1826, 8vo,) adopts generally the same opinion. Such must be the mode of division in art. 2.: Solidos sexcentos Componat: ad opus dominicum et (id est) pro fredo solidos ducentos componat. While the murder of the Frank is rated at the same sum with that of the Wargengus, in the former case, 400 are paid to the family, and 200 to the Fiscus; and in the latter, the whole 600 are paid to the Fiscus; since the slain foreigner is presumed to have left no heirs.

nes Adelingi (57 a) fuerunt: sic enim apud eos quaedam nobilis prosapia vocabatur." The fact of the existence of an old Lombardic nobility, is therefore no longer to be doubted, and we shall find that they were distinguished by the same names as the nobles among the Saxons.

The Judicial functions of the freemen were the same among the Anglo-Saxons, &c.

In the Frison, Anglian, and Saxon laws, Nobiles and Liberi, Adelingi and Liberi occur, (58) and a chronicler of the ninth century says of the Saxons:—quae gens omnis in tribus ordinibus divisa consistit. Sunt enim inter illos qui Edhilingi, sunt qui Frilingi, sunt qui Lazzi illorum lingua dicuntur: Latina vero lingua hoc sunt Nobiles, Ingenuiles atque Serviles. (59) The accounts of the

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(57 a) Paul. Diaconus. (Warnefrid, the Deacon of Friuli), i. 21. Some MSS. read Adalingi, and others Lithingi. To this order we must also refer the Edelingi, in the Friulian deed, A. C. 1280, given by Liruti, and mentioned above, p. 195.

(58) Nobiles and Liberi. in L. Frision. T. 1. §. 1. 3., (Canc. iii. i.) and in L. Saxonum, T. 17. §. 1. (ib. 59.)—Adalingi and Liberi. in L. Angliorum et Werin. T. 1. §. 1. 2. (ib. 30.) Concerning the Bavarian nobility, see above, p. 173. n. 1. Compare also Eichhorn deutsche Rechtsgesch. Th. 1. §. 47.

(59) Nithardus, lib. 4. c. 2. in Bouquet, T. 7. p. 29. On account of this very term—"Frilingi," we cannot admit Möser's opinion (Osnabr. Gesch. II. 2. § 11.),—that the title of freemen is only found in common use, and as a mark of honourable distinction, after the Heerbann had ceased. In a preceding passage (1. 3. §. 32. note e. med.), Möser also

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institutions of all these people in early times are very imperfect, and the condition of their freemen cannot be proved so distinctly as among the Lombards and Franks. We are nevertheless justified, both by the general analogy, and by the evidence of later times, in applying to the whole a similar character. Thus, in a Lower-Saxony deed of donation, A. C. 1256, it is narrated, "Cumque secundum jura terre nostre fuisset ab hominibus illis qui liberi vocantur, et qui secundum suam conditionem debent hujusmodi donationibus interesse, diligentius perquisitum ... hujus rei testes sunt ... milites Henricus ... alii homines liberi Ludovicus," &c. (60). Finally, among the Anglo-Saxons, the freemen, Freoman, were classed into associations of hundreds and of tens. The members of the latter stood to each other in the relation of mutual guarantees of their several rights, while the Bondmen were defended or represented by their Lords (61). The full capacity of par-

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erroneously assumes,—that from the circumstance of Liberi occurring only in later times, Nithard was forced in the ninth century to use the word Ingenuiles. But the preceding Note contains references to laws attributed to Charlemagne, in which the expression Liberi is employed. Eichhorn deutsche Rechtsgeschichte, Th. 1. §. 144–147.

(60) Extracted from an unpublished history, founded on a progress of deeds, of the family of Alvensleben.

(61) LL. Cnuti (A. C. 1017–1035), Second Collection,

ticipating in all rights, is plainly understood and confirmed by these forms. Each individual among the ten had his own peculiar Caput; but, the Bondman partook only of the Caput of his master. The union of ten men was called, in many districts, Tien Manna Tala—the number of ten men; and more frequently—Freoborges, or Friborgus, which signifies,—the whole body of mutually guaranteeing freemen. The freemen themselves also frequently bear the name of Friborgi (62). The two last syllables of this term serve to

C. 19. 28. (ed. Wilkins, p. 136–139. The Latin translation alone is given in Canc. iv. 305, 306): Volumus etiam, ut quilibet homo liber (freoman) in Centuriam (hundrede) et Decemviratum (teodunge) conferatur, qui excusatione vel capitis æstimatione dignus esse velit .... ut quilibet in Centuriam et ad fidejussionem (borge) ducatur, et fidejussionem ibi servet, et ad quodcunque jus ducat.—C. 19. Et quilibet dominus famulos suos in propria fidejussione habeat (on his agenum borge); et si quis eum alicujus rei accuset, respondeat in ea Centuria ad id, cujus accusatus sit.—C. 28.

(62) LL. Edovardi (A. C. 1042–1066), C. 20. (Wilkins, p. 201, Canc. iv. 338). Here the Latin is the original. "De Friborgis. Præterea est quædam summa et maxima securitas per quam omnes statu firmissimo sustinentur, videlicet, ut unusquisque stabiliat se sub fidejussionis securitate quam Angli vocant Freoborges, soli tamen Eboracenses dicunt eandem tien manna tala, quod sonat Latine, decem hominum numerum. Hæc securitas hoc *modo* fiebat, scilicet, quod de omnibus villis totius regni sub decennali fidejussione debebant esse universi: Ita, quod si unus ex decem forisfecerit, novem ad rectum eum haberent: quod si aufugerat ... inveniri non

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explain the Rachinburgi, and to prove, beyond a doubt, that the free Franks also bore the name of a similar union or confederacy.

Heerbann signifies the summoning of the Freemen.

Before concluding these inquiries into the condition of the old German freemen, a few subjects intimately connected with them deserve consideration. One of these is the Heerbann. Möser has remarked, that mannire and bannire are fundamentally the same idea, but modified to suit the changes in the constitution. Thence, he properly infers the identity of Heermannie or Arimannie, and Heerbann. (63) Heer is viewed by Möser

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posset, quia in omni friborgo unus erat capitalis quem vocabunt Friborges heofod, ipse capitalis sumeret duos de melioribus sui friborgi, et de tribus friborgis sibi propinquioribus acciperet de unoquoque capitalem et duos de melioribus . . . et ita se duodecimo existente purgaret, se et friborgum suum (si facere posset), de forisfacto et fuga supradicti malefactoris. Quod si facere non possit, ipse cum friborgo suo damnum restauraret." . . . . In this quotation, and in C. 32, Friborgus signifies the union itself, and not the individual members of it. But this is quite accidental, and the individual may also bear the same name. It is stated in Fleta, lib. i. C. 47. §. 10. " Frichborgh est laudabilis homo," etc.

(63) Möser Osnabr. Gesch. Th. 1. Abschn. 1. §. 21. Mannire and Bannire are explained in his comments (§. 20. note a. med.) on a passage from Hincmar (ad episc. regni pro Carolomanno, §. 15. T. 2. p. 224. ed. opp. Paris, 1645, fol.) See also Cap. I. a. 819. art. 12 and ed. Pistense C. 6. (Baluz. i. 602. infr. ii. 176. infr.)

as the root of both terms. The Ariimen, consequently, are the Heermänner, or men bound to serve in the national army; and Heerbann—the summoning of the army. It has been shown, (63 a) that the term Arimann is truly derived from—Ehre, dignity; and the meaning of Heerbann must therefore be—the summoning of the Ehren, or freemen. This opinion is confirmed by the different modes of spelling the word. The Heerbann is called Arribannus, Arbannum, Airbannum, Haribannum, and Hairbannum. (64) It may be remembered, that the varieties in the orthography of Arimann were the same. (64 a) The French Arriere-ban, likewise affords an important argument in favour of our explanation. From ignorance of the true root, that term has been considered as meaning—a second or last summoning of the reserve army; while its real meaning is the same with the common Heerbann. Its alleged signification of a second summoning, rests upon no other proof than the above false etymology. Halbannum, and the French Haut-ban, are syno-

(63 a) See above, p. 191.

(64) The authorities themselves are in Ducange v.—Herimanni III. 1119 sq. Arribannus is the reading of the Appendix Marculfi C. 31. (Canc. ii. 259), and Haribannus that of Capit. IV. Caroli M. incerti anni §. 13, (Baluz. I. 532. supr.)

(64 a) See above, p. 184.

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nymous with Heribannum. Both terms, like Arimania, signify either the money contributions of the freemen during the existence of the old constitution, or the summoning of the freemen, particularly for the General Placitum, which was uniformly held, thrice a year, in each county. (65) These Placita were oc-

(65) Ducange v. Halbannum, III. 1040; and, there the remarkable ordinance of Louis VII. for the city of Bourges, A. C. 1145, which is contained complete in the "Ordonnances de la troisième race," I. 9.... "Praepositus autem atque Vigerius, quotiescunque volebant, halbannum submonebant, et villanos sese redimere coercebant; de quo quoque praeceptum ab ipso est, ut illa praeceptio halbanni remaneat, et halbannum tamen ter in anno fiat termino competente sine ulla redemtione, rustici (leg. ne rustici) sua negotia amittant, et hoc consilio bonorum virorum ipsius civitatis." Both in Ducange, and in the Notes on the "Ordonnances," halbannum is quite erroneously interpreted to be a Corvée, or compulsory feudal service. It signifies merely the old Placitum of all the freemen, which had been abused by the authorities, for the purpose of extorting money, and compelling the free cultivators of the ground to pay fines, when they could not attend, without neglecting the necessary business of their farms. This explanation is placed beyond a doubt, by a strikingly similar extract from the Worms Capitulare of Louis le Debonnaire, a. 829, c. 5: (Baluz. I. 671. supr.)— "De Vicariis et Centenariis qui magis propter cupiditatem quam propter justitiam faciendam saepissime placita tenent, et exinde populum nimis affligunt, ita teneatur .... ut videlicet in anno tria solummodo generalia placita observent, et nullus eos amplius placita observare compellat." Parallel passages may be found in Capit. V. a. 819. art. 14.—Capit. lib. 4. c. 57. (Baluz. I. 616. infr. 788. supr.)—L. Long. Caroli, M. 69. (Canc. i. 157.)

cupied more, with the administration of justice, and the other public employments appropriate to a period of peace, than with military exploits; and they afford an additional reason for maintaining, that the term Heerbann was not so closely connected with the summoning of the army, as with the assembling of the Ehren, or Free.

The national names of Germans, Goths, Franks, &c. are derived from Ariman, &c.

Another resemblance may be traced between the freemen, Arimen, and the national name of Germans. This affinity has not escaped the penetration of Möser, although he perseveres in maintaining 'Heer' to be the fundamental idea. (66) A strong argument, in favour of the connection between the names of the nations, and the freemen composing them, is derived from the Spanish word Hermano, Germanus, brother, and from a remarkable passage of an author, towards the end of the sixth century: (67)—"Anno IX. Justini Imp. . . . Cosdroes Persarum Imp. . . . ad vastandos Romanorum terminos promovet: cui Justinianus dux Romanae militiae . . . . bellum parat: et . . habens secum gentes fortissimas, quae barbaro sermone Hermam (leg. Hermani) nuncupantur . . . supe-

(66) Möser Osnabrück. Gesch. Th. 1. Abschn. 3. §. 2. See above, p. 184. med.

(67) Johannes Biclariensis in Canisii lectiones ant. ed. Basnage, T. 1. p. 338. Antv. 1725, fol. Möser, l. c. note b, quotes the passage, but neither fully, nor accurately.

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rat." The term, denoting the Lombardic order of freemen, is spelt in documents—Arimanni—Heremanni—and Germani; and this affords another evidence of the same connection. Indeed, it might almost be maintained, that Alemanni, Aremanni, and Germani are one and the same word, differing only in pronunciation, since the *l* and the *r* are often indiscriminately used, as in Halbannum and Harbannum. (68) The national names of the Goths—boni, boni homines, and of the Franks—Freemen may be referred to the same source. Thus the fundamental principle of the earlier constitution has been preserved in the language throughout all the variety of changes arising from pronunciation and writing; and the freeman of old times has given his name to whole tribes and incorporated nations. On this supposition, the Arimanni, Rachinburgi, Frilingi, Freoman, Friborgi, Germani, Alimanni, Gothen and Franks, were all originally the same; and the generality of this pervading distinction, affords the best and surest evidence of its character, as a universal constitutional doctrine. These national etymologies, however, as neither historically certain, nor ex-

(68) Möser, l. c. note f. while noticing the reasons, and the frequency of this agreement, omits halbannum, the most important example of it. See above p. 184. 213.

clusively accurate, (69) have been intentionally separated from the researches concerning the condition of the free; which are not enveloped in equal mystery, but rest upon the infallible evidence of deeds.

THE JUDICATORS—SCHÖFFEN.

In the Capitularies, elected Judicators are mentioned.

Under Charlemagne, and his successors, the judicial department was arranged in the same manner, over their whole empire. Universally, justice was administered by a number of Scabini or Judices: and the Count, his Deputy, or the Missus of the king, uniformly acted, as their president. The Capitularies plainly show who these Scabini were, and how they originated. It is said that the Missus, along with the Count and, the people, chose them—deposed them when unworthy—and appointed, in the same manner, others in their place. (70)

(69) Many roots of the word German are given in (Fulda) Sammlung und Abstamm. Germ. Wurzelwörter. Einleitung S. 3; and ours among the rest; "har, her, illustris, venerabilis, honorificus." Both Wiarda (uber deutsche Vornamen S. 45. 46.) and Pfister (Geschichte von Schwaben B. i. S. 59. 60.) admit the identity of German and Alman. Our etymology, and indeed all the others, agree equally well with the assertion of Tacitus (Germ. C. 2.) "ob metum ... Germani vocarentur."

(70) Capit. I. a. 809. art. 22. (Baluz. I. 466. inf.) "ut ... Scabinei boni et veraces et mansueti cum Comite et populo

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Accordingly, the Scabini occur in deeds not merely as judicators, occupied in the discharge of their judicial functions, but as a common personal title of one of the regular orders of society. (71) Now, were these Scabini as modern authors have generally supposed, an institution of the earliest times; if so, the laws already quoted, are only confirmations of them; or were they first introduced by these laws, in the place of another and older custom? For the purpose of avoiding confusion, the term Judicators shall be employed, in an indefinite sense, to denote the German judges generally. Let us therefore inquire, whether the German Judicators —Schöffen (71a) were from the first Carlovingian Scabini, or some other order of persons.

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eligantur et constituantur." Capit. Wormatiense a. 829. T. 2 art. 2. (l. c. p. 665. infr.) "Ut Missi nostri ubicunque malos Scabineos inveniunt, ejiciant, et totius populi consensu in loco eorum bonos eligant." Capit. a. 873. art. 9. (Baluz. II. 232.) "Ut, sicut in capitulis avi et patris nostri continetur, Missi nostri, ubi boni Scabinei non sunt, bonos Scabineos mittant; et ubicunque malos Scabineos inveniunt, ejiciant, et totius populi consensu in locum eorum bonos eligant." The mode of election is not so definitely explained in Cap. II. a. 809. art. 11. (Baluz. I. 472. supr.)

(71) Examples are given above, p. 183. n. 27.

(71 a) In the same sense as on p. 172. 176. These Judicators as differing from the Judges, Juries, and assessors of our time, should, if possible, never be designated by any of these titles; although the occasional employment of the first may perhaps be unavoidable.

These Scabini, or elected Judicators, are foreign to the old Germanic Constitution. The whole body of freemen—all the Rachinburgers, or boni homines, within the same jurisdiction, in which the lawsuit occurred, were Judicators, and pronounced the decision in common. Since the time of Charlemagne, there arose a particular order of elected Judicators, or Scabini, although they neither possessed the exclusive privilege of sitting in judgment; nor could they prevent the freemen from exercising their judicial functions. The attendance of the Scabini, however, as public servants, was compulsory, while the other freemen might be absent when they pleased, with the exception of the three great annual meetings, which all were required to frequent. But, this historical account of the Judicators requires a more particular examination.

But, in the old Germanic Constitution, all the freemen were Judicators.

Although not decisive, it is of much importance, that the term Scabini, which always denotes in the Capitularies and deeds—the elected Judicators, never occurs before the time of Charlemagne: for, the few deeds of an earlier date, in which it appears, have been rejected, on other grounds, as forgeries. (72) The new institution required a new title,

The Frank Scabini do not occur, before the time of Charlemagne.

(72) Thus, "Signum Tmusonis Scabini" is found in the spurious deed of a Burgundian Duke Arnulph, A. C. 706. Brequigny diplomata, T. 1. N. 264. p. 379.—Gallia Christ. T. 13. Instr. p. 369. In like manner, "Scripta per ma-

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(73) Of more consequence than the name, is the office itself, as represented in the old laws and early collections of forms. While, in the later deeds, as shall be immediately shown, for the most part, only two kinds of Judicators occur—the Scabini, and the ordinary freemen, one class alone is mentioned in the early authorities. The members of that order are called Rachinburgi, or boni homines; (74) and bear, therefore, the same name, which is applied in later times to the freemen, for the purpose of distinguishing them from the Scabini.

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num Ello notarii et scavini," occurs in a false Lombardic deed of Aistulph, A. C. 752. Tiraboschi storia di Nonantola, T. 2. N. 4. p. 18. not. 10.

(73) The following are the earliest notices of the Scabini by name. A Placitum was held, in the southern parts of France, A. C. 780, before several "Scabinos ipsius civitatis aut bonis hominibus qui cum ipsis ibidem aderant." Gallia Christ. T. 1. Instrum. p. 106. B. In a Placitum of Charlemagne, A. C. 781, (Bouquet, T. 5. p. 746), a judgment is given upon the authority of a preceding one. On the first occasion, the parties had appeared before the "Comitem et suos Escapinios;" and the circumstance had been authenticated by "Notitia bonorum hominum manu firmata vel ipsius Comitis." The meaning of the expression, in this instance, is not so definite, as it afterwards became. Farther, there is a Praeceptum of Charlemagne, A. C. 789, (Baluz. I. 250,) in which commission is given to the Comes Trutmann, "superque vicarios et Scabinos, quos sub se habet, diligenter inquirat." These Scabini are plainly the same public functionaries as are mentioned in the later Capitularies.

(74) See above, p. 198—205.

Consequently, either the Judicators consisted of Scabini alone, under a different title, and the freemen only afterwards acquired their judicial privileges: or, the whole body of freemen were originally Judicators, and the Scabini were a subsequent innovation. The first implies an arbitrary and improbable change in the phraseology, and also contradicts the whole analogy of history; which shows, that in every other relation, the freemen were of more importance in early than in later times. The second, however, is free from all objections, and has been already sufficiently established. (75) Actual processes, in these early times, are of very rare occurrence; although there is one, which perfectly agrees with our doctrine. In the cotemporary biography of St Amandus, from the first half of the seventh century, it is narrated: "Comes quidam ex genere Francorum, cognomine Dotto, Congregata non minima multitudine Francorum, in urbe Tornaco, ut erat illi injunctum, ad dirimendas resederat actiones. Tunc . . . praesentatus est quidam reus, quem omnis turba acclamabat dignum esse morte." (76 No mention is here made of Scabini, but only of a crowd of assembled

(75) See above, p. 198. seq.

(76) Bouquet, III. 533.

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Franks, as in the above quoted passages from the forms. (76 a)

The freemen might sit in judgment along with the Scabini.

The existence and duties of the Scabini, during the latter period, are sufficiently known, and the extracts from the Capitularies already given, leave no doubts on these subjects. It has not, however, been generally noticed that, besides the Scabini, an indefinite number of freemen sat in the Courts, as Judicators. This practice is, indeed, not prescribed in the Capitularies; but, is not forbidden, and occurs in so many processes during this period, that its general adoption, and conformity to law cannot be questioned. One of the most remarkable cases (76 b) has been already noticed, and a few additional examples may suffice. The Judicators, in a Placitum at Narbonne, A. C. 783, were, 2 Vassi, 6 Judices, 14 boni homines. "Cumque ibi residerent praescripti missi et Judices vel pluris bonis hominibus in Narbona civitate ad rectas justitias terminandas et causarum exordias dirimendas in eorum praesentia; ibique in supradictorum judicio." etc. (77) Likewise in Narbonne, A. C. 821, we find, 5 Judices "vel aliorum bonorum hominum qui

(76 a) See above, p. 200.

(76 b) See above, p. 201.

(77) Vaissette, T. 1. preuves, p. 24. infr.—Gallia Christ. T. 6. Instr. p. 1. It is contained in a very different, and apparently in a much improved form, in Baluz. II. 1394—1396.

subter subscripturi vel signa factores sunt;" and the names of five of these are given. (78) At the same place, A. C. 862, there were 8 Judices (here called Judiciarii) "sive in praesentia Haccori . . . . . (then follow 12 other names) et aliorum multorum bonorum hominum, qui cum ipsis ibidem residebant in mallo publico in Narbona civitate." (79) In Southern France also, A. C. 873, it is said: "et judices qui jussi sunt causas dirimere vel legibus definire, id sunt quinque, Witesindo, Medemane, Uniforte, Argefredo, Eigone judicum, et Vulfino clerico, et Adoura saione, vel aliis quam plures bonis hominibus qui cum ipsis in idem aderant," and of these the names of seventeen are given. (80) A Placitum, A. C. 875, takes notice of 10 judices, 1 Sajo, and 19 "vel aliorum plurimorum bonorum hominum." (81) And, in A. C. 883, a Placitum of a Bishop of Carcassonne was attended by 1 Comes, 1 Vicecomes, 2 Abbots, 4 Judices, and 21 other persons without any designation, "vel aliorum multorum." (82) Many similar examples may be found, in the collections of deeds. (83)

(78) Vaissette, l. c. p. 55. infr.

(79) Vaissette, l. c. p. 113. med.

(80) Vaissette l. c. p. 124.—Mabillon diplomat. N. 103. p. 543.—Gallia christ. T. 6. Instr. p. 9.

(81) Vaissette l. c. p. 128. med.

(82) Gallia Christ. T. 6. Instr. p. 418.

(83) Vaissette, T. I. preuves, p. 99. 118. T. 2.

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And continue their old judicial functions.

Against the proof arising from these examples, it may perhaps be objected, that all real power was vested in the Scabini, and the Boni Homines were mere spectators, for the purpose of giving to the procedure an air of publicity. Nevertheless, there is not the slightest authority for such an opinion. The employments of both classes are the same. The power of judging is attributed to both, and both subscribe the authenticated judgment or deed, which was prepared, of the proceedings. Consequently, the right and title of every freeman to attend every Court, as a Judicator, was not in the least degree impaired by the introduction of the Scabini. As concluding and complete evidence of this fact, we may refer to several judgments, after the establishment of the Scabini, which were pronounced, as in the early times, by the Boni Homines alone. Thus, a Placitum of Count

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preuves p. 69.—Baluz. II. 953. 1489.—Mabillon diplomat. p. 541.—Gallia Christ. T. 1. Instr. p. 106. 107. T. 6. Instr. p. 313. 423.—Martene Coll. Ampliss. T. I. p. 322. 334. In the last reference, it is said,—" et aliis plus bonis hominibus, tam satellites quam pagenses." Satellites are vassals; and pagenses, freemen of the old constitution. Boni homines, and pagenses, were originally synonymous (see above, p. 204. n. 53); but, about this time, (A. C. 984), the old distinctions and phraseology had undergone great modifications. Consult also the extracts from German deeds, given by Eichhorn deutsche Rechtsgeschichte, Th. 2. §. 258. not. b.

Bernhard of Toulouse, A. C. 870, was held: "Ante bonorum virorum quam plurimorum." A Placitum at Besiers, A. C. 1013, narrates: —"Notitia Wirpitionis . . . qualiter vel quibus praesentibus bonis hominibus (six of them are named) . . . et in praesentia aliorum bonorum hominum qui ibidem erant;" and, there are two similar notices, of the eleventh century, from the dioceses of Besiers and Narbonne. (84) The same practice is found in the Capitulare Saxonum, A.C. 797; where no mention is made of Scabini as judicators, but of the—"Vicinantes, convicini, pagenses:" (85) These expressions may refer either to the constantly enduring right of the Freemen along with the Scabini, or to the circumstance of the elected judicators not having been generally introduced at this time into Saxony. In either case, the passage is decisive, against the originality of the Scabini, as an old Germanic institution. Even in the general Capitularies, there are traces of the Freemen, continuing to discharge the judicial functions. Thus, every Count is ordered to bring along with him, when summoned by

(84) Vaissette, T. I. preuves, p. 122. T. 2. preuves. p. 167. 222. 311. Still later, the Judicators were generally styled Boni. Thus, in an ordinance of Louis IX. A. C. 1254, in Ducange I. 1228.

(85) Cap. Sax. Art. 4. (Baluz. I. 277.)

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the Emperor to the General Placitum, Twelve Scabini; and, if that number could not be found, then ;—' de melioribus hominibus illius comitatus suppleat numerum duodenarium.' (86) In particular cases, the right of all the freemen to judge has continued down to the latest times. " There is still in the Canton of Schwytz, in small matters, a Street Court, consisting of the seven first countrymen, who come into the street, where the parties are met, at the place of judgment, for the decision of their dispute." (87) The already quoted work of Liruti, contains also strong evidence of the endurance of the old original right of the freemen to sit in judgment, and of the continuance of these truly popular courts in Friuli. This is found partly in the deeds, A. C. 1419 and 1551, and partly in very recent times. (87 a) " Quot enim in Foro Julii Judicaturi Tribunalibus adstant, vel Feudatariorum nostrorum, vel Monasteriorum, Ecclesiarum, vel Abbatum aut Capitulorum, vel aliorum a principe Jurisdictionem habentium, qui ideo nuncupantur *Astantes* hujuscemodi Judiciorum etc." and afterwards, " Villani et Rustici illi *As-*

(86) Capit. II. a. 819. Art. 2. (Baluz. I. 605.) See below, p. 231. n. 96.

(87) J. Müller Schweizergeschichte, B. 1. C. 15. S. 400.

(87 a) See above, p. 194. Jo. Jos. Liruti de Villafreda de Servis medii Ævi in Forojulii, p. 36–37. and p. 44–46.

tantes, qui tales sunt plerumque, immo omnes: "—then, it is said;—" Judicaturi assident Comiti, vel ejus vicesgerenti, cum de vita, de substantiis, de libertate, et de fama hominum Comiti illi subjectorum lites disceptantur." In France also, the memorials of this institution are preserved in the term—Prud-hommes; which is not derived from prudens, but from probus, and is the mere translation of boni homines. (88) The remembrance of these freemen-tribunals, still lives in the old ballads of the North, which frequently mention—the pronouncing judgment in the Court—as the universal employment of the Freemen. (89)

Certain offences deprived the Freemen of their judicial rights.

Although the fact itself be perfectly certain, a few explanations may still be necessary to place, in a proper light, its intrinsic probability and connection with the system. We have seen, that, in the original constitu-

(88) Ducange, I. 1227. Judgments, pronounced by Prud-hommes, are found even towards the end of the thirteenth century. Montesquieu, Espr. des Loix, XXVIII. 42.

(89) In several passages of the old Edda, e. g. in Greips Mál or prophecy:—" Thou sleepest not a sleep, thou judgest not in lawsuits, thou carest for no one, when thou seest not the maid," &c. And in the second Song of Gudrun:—" They could not sleep, nor settle the lawsuits, until they had caused Sigurd to die." This notice was communicated by W. Grimm.

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tion, all the Freemen of the jurisdiction might attend the Courts, at pleasure, as Judicators. This prerogative must be understood, however, as belonging only to men of blameless and irreproachable character. The Salic law required—Rachenburgi idonei; and the Capitularies ordained, that the criminal condemned to death, and subsequently pardoned, could not afterwards act, either as a Scabinus, or witness. (90) This connection of the two powers, of judging and attesting, proves that the incapacity produced by a previous crime did not merely refer to the Scabini of the new constitution, but to that general participation in judicial matters enjoyed by the free. Indeed, the popular composition of these tribunals renders it probable, that each of the parties, without specifying reasons, had the right of challenging all the Judicators whom he suspected. If this were the case, the litigants had in fact consented to the decision of those whom they did not reject, and had thus, in the true spirit of the oldest Germans, chosen them as arbiters.

The Scabini only lightened the judicial duties of the Freemen.

An attempt must now be made to discover the origin and purpose of the Carlovingian Scabini. The unfitness of the ordinary Judica-

(90) See above, p. 199. Capit. I. a. 809, art. 28. 30. (Baluz. I. 467. 468. supr.) L. Long. Caroli M. 67. (Canc. i. 157.)

tors might have been the occasion of electing Scabini; but, this assumption is at variance with the fact—of the boni homines deciding causes sometimes alone, and at other times with the Scabini, long after the reign of Charlemagne. The following is a preferable account of this Carlovingian magistrate. Seven judicators were necessary to constitute a Court. (91) The attendance of that number was easily obtained on the great district-assemblies, held thrice every year, under the Count. These formed the head-courts,—echte ding, which all the freemen were obliged to frequent. On the other hand, for the small judicial assemblies during the interval, which were always specially summoned, the Count or his deputy had the power of arbitrarily citing the judicators. (92) This privilege was abused, for the purpose of collecting the penalties of non-attendance from the absent. The freemen themselves, likewise, may have too often avoided their duties as a burden; for the departure of public spirit, and of interest in public matters, rapidly followed the decline of the old constitution. Now, the Scabini were intended

(91) L. Salica emend. T. 52. §. 2. T. 60. §. 4. (Canc. ii. 148, 151.) See below, p. 237.

(92) See above, p. 199. n. 47. A modification of these views may be found in—Rogge Gerichtswesen der Germanen, S. 66–76.

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to obviate the evils arising from these two opposite sources. As public authorities, the specific duty of dispensing justice was made imperative upon them, and the necessary attendance of the other freemen was relinquished. The Counts, or their deputies, were deprived of the arbitrary nomination of the Judicators requiring to be summoned for the intermediate Courts. The Judges of these Courts were placed upon a permanent footing, and their election was vested in the great body of the people. So far the Scabini were an innovation, and this account of their origin perfectly accords with the undiminished judicial functions of the other Freemen. The language of the Capitularies places this matter beyond a doubt. The whole question there is,—who are obliged, and not who have the right, to attend the Placitum? The former was the case—with the litigants, Scabini, and vassals of the Count; (93) while the attendance of the other Freemen was only compulsory, three times in the year, at the great district-assemblies, under the Count. (94) Indeed,

(93) Cap. II. a. 809. art. 5. (Baluz. I. 471) "Ut nullus alius de liberis hominibus ad placitum vel ad mallum venire cogatur, exceptis Scabinis et Vassis Comitum, nisi qui causam suam quaerere debet ac respondere." See also Capit. I. a. 809. art. 13. (Baluz. I. 465.)

(94) The authorities are given above in p. 214. n. 65. In particularly urgent cases, extraordinary general Placita were summoned; e. g. Cap. a. 857. 858. (Baluz. II. 95. 101.)

summoned for each Placitum,—the attendance of the other freemen was required only thrice a year,—and the arbitrary citations had occasioned the same complaints. (103) From this period, therefore, the Lombardic Judicators were exactly the same with the Frankish, although they are more frequently denoted in Italy by the term Judices, than by Scabini. The cases are decided by the Judices, Scabini: or by the Freemen, Boni Homines, Arimanni; and occasionally by both these classes, conjointly. (104) From the close resemblance in the later practice, among the Franks and Lombards, we may certainly argue that its earlier condition was the same. If Charlemagne first gave the Lombards proper Judicators, these could only be the elected Scabini; since the participation of all the Freemen in the judicial functions, by its very nature, could not be introduced in the same arbitrary manner; and the very decline of that participation, among the Franks themselves, had rendered the establishment of elected Judicators

(103) L. Long. Caroli M. 49. 69. (Canc. i. 155. 157).—Lotharii sen. 48. 49. 60. 61. 74. (ib. 200, 202, 205.) Concerning the Placitum, held three times a year, see the deed, A. C. 1182, quoted above, p. 186.

(104) The leading authorities have been already quoted, for other purposes, in notes 16. 18. 20. 25. 28. Other examples may be found in Muratori Ant. It. T. 1. p. 401. 475. and T. 5. p. 1027.—Tiraboschi Storia di Nonantola T. 2. N. 25. 28. 63. 312.

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indispensable. The only opinion therefore, remaining for our adoption, is—that the right of the whole body of Freemen to act as Judicators, was equally an original institution among both nations.

The Presidents had no voice in the preparation of the judgment.

Before concluding our remarks on this subject, a few general circumstances still remain to be noticed. It was shown at the very commencement, and proved by many examples, that the Count, or some other official person, was always the President of the Judicators. Now, this circumstance must not be considered as proving that the Judicators were the mere advisers of their Presidents, and that all real judicial power was vested in the hands of the latter. On the contrary, the Presidents did not at all participate in the preparation and deliverance of the sentence. Their duty was merely—to summon the Judicators,—to lay the business for which they were assembled before them,—and to execute the judgment which they pronounced. Evidence of this is found in the Salic and Ripuarian laws. They declare,—that to the Rachinburgers alone the application for justice must be made,—that by them only must the decision be pronounced, and—that against them, exclusively, an action lies, if judgment cannot be obtained. (105) The Salic law,

(105) L. Salica emend. T. 59. 60. (Canc. ii. 151.)—L. Ripuar. T. 55. (ib. 310.)

moreover, expressly commits to the Count the execution of the sentence pronounced by the Rachinburgers. (106) In the Capitularies, a knowledge of law is required, as the qualification of the Count or his deputies, not because they administered justice themselves, but, with the view of enabling them to check any improper interpretation of the law by the Judicators, in their presence. (107) The Capitularies also ordain, that the Count, or his deputy, shall pointedly execute the judgment of the Scabini, without presuming to exercise their own clemency. (108) The odd number of seven also favours the opinion, that the President had no voice in the decision; since, by him equality might have been produced, which it seems to have been an object to avoid, by a different arrangement. (109) In numerous forms and decrees of courts, the decision appears to have depended exclusively on the Judicators, while of the

(106) L. Salica antiqu. T. 59. art. 2. (Georgisch p. 117, or Canc. ii. 101.)

(107) Appendix Cap. III. a. 803, art. 4. (Baluz. I. 396), "Ut Comites vel vicarii eorum legem sciant, ut ante eos in juste quis nemini judicare possit, nec ipsam legem mutare." See, also, Cap. V. a. 803 art. 19. (ib. 400).

(108) Cap. II. a. 813 art. 13. (Baluz. i. 509.) "postquam Scabini eum (latronem) dijudicaverint, non est licentia Comitis vel Vicarii ei vitam concedere."

(109) See above, p. 229. Möser Osnabr. Gesch. Th. I. Abschn. 4. §. 10.

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Counts it is merely said,—that all was done in their presence. (110) The entire judicial functions were, therefore, in the hands of the Judicators. They had the right both of investigating the facts, and of stating and applying the law; for such must be the meaning of the expression of the Salic and Ripuarian Codes,—'legem Salicam s. Ripuariam dicere.' (111) In this respect, the Court of the German Judicators differs essentially from the old judicial system of the Romans, in which the functions are separated, and the Prætor determines the law, while the Judex investigates the facts. It is also very remarkable, and hitherto unexplained, that the right of the juries in England, which appears to spring so easily from the old German practice, is, in this essential particular, different from the German, and accordant with the Roman system. (112)

(110) Many of these authorities are collected in "Theorie des loix politiques de France," T. 8. P. 3. Liv. 4. Ch. 27. p. 9. 77, and preuves p. 25, where the whole question is skilfully discussed.

(111) L. Salica emend. T. 60. (Canc. ii. 151.)—L. Ripuar. T. 55. (ib. 310.)—Rogge über das Gerichtswesen der Germanen. S. 68. Halle. 1820. 8vo.

(112) Materials for this inquiry may be found in a Treatise, "Sur l'origine des Jugemens par pairs et par jurés," at the end of (Bernardi) "Institution au droit Francais." Paris, an. VII, 8vo. The juries are there derived from the Compurgators. It is inconceivable, how this author has kept

The Judicators and Witnesses were of the same nations with the litigants.

From the already explained principles of the Personal laws, (112 a) it is obvious, that the Judicators must have been of the same nations with the litigants. Otherwise, an ignorance of the law of the case may have pre-

himself ignorant of the Judicators; although, their disappearance or transition into the juries, is the most difficult point of the whole investigation. Millar, (Engl. Govern. i. 332), and Reeves (Hist. Engl. Law, i. 18), oppose the derivation of Juries, from Compurgators or Cojurors; but, Spence (Origin of Laws, p. 477.), Turner, Spelman, and the Edin. Rev. XXXI. 113. 124. 127. 131. adopt it. During the Anglo-Saxon period in England, the Judicators gave their judgment upon the matter of fact, as well as of law. Spence, l. c. p. 448. Reeves, l. c. i. 17. The difficulty and length of many of the investigations, even in the Anglo-Saxon age, is, with the highest probability, considered by Hallam, (Midd. Ages, ii. 400.) to have occasioned remits from the whole Judicators, to select bodies of them, and thus to have given rise to Juries. This opinion, and that of Millar, (l. c. i. 187.) agrees with Eichhorn's supposition, according to which, the Juries arose from the law relations having become too intricate and refined for ordinary understandings. In Germany, relief was sought in learned Judicators; while the English expected to obviate the difficulty by an educated Judge. Regarding the question—whether the British Juries are, or are not, Judges of Law, as well as of fact? See—Tomlin's Law Dict. v. Jury iv. 2, and the authorities there given. Also—Pettingall's "Enquiry into the Use and Practice of Juries among the Greeks and Romans: from which, the origin of English Juries may properly be deduced." 1769. 4to.

(112 a) See above, Chapter iii.

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vented its decision. (113) The rules, followed by the Judicators, when the parties professed different laws, have been also noticed on a former occasion. (114) Frank, Gothic, Roman, etc. Judicators, frequently occur in the same deed. (115) This composition of the Court was necessary, when the suitors belonged to these different nations. The Judicators were then undoubtedly allowed to consult together; and those, e. g. of the Franks, were easily instructed by their brethren of the Goths, when any peculiarity of the Gothic law required explanation. What has here been said, regarding the nation of the Judicators, may be applied also to that of the witnesses; for these, notwithstanding the difference of their functions, were viewed as Judicators, in the judicial system of the Germans.

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(113) Adrevaldus de miraculis, S. Benedicti, lib. 1. P. 2. C. 2. Num. 8, in Actis S. S. Martii, T. 3. p. 308, "quod Salicae legis judices ecclesiasticas res sub Romana constitutas lege discernere perfecte non possent."

(114) An example of Roman Scabini, in a process between Franks and Romans, has been already noticed. See above, p. 151, 152.

(115) An instance is given above, p. 201. The variety is still greater, in an Imperial Placitum, at Ravenna, A. C. 967. Fantuzzi monum. Rav. T. 2. p. 28, "residentibus cum eis Romanorum Francorum Longobardorum atque Saxonum (Ala) manorum genus."

The Jurisdictio Voluntaria also belonged to the freemen-tribunals.

Hitherto, the Judicators have been considered only with reference to the Jurisdictio Contensiosa; but, the Jurisdictio Voluntaria also belonged to them. There is, therefore, no contradiction in the notices found in laws and deeds of the solemn acts having been performed sometimes before Rachinburgi, Boni homines, and Scabini, (116) and, at other times, merely before witnesses: since in these cases, the Judicators and witnesses are the same persons. The latter, like the former, were required to be of the same nation with the parties; for the purpose, no doubt, of being able to testify, that the necessary legal forms had been observed. This rule, however, was, by no means, strictly followed; and the Capitularies, themselves, expressly allow foreign witnesses to be adduced, when no native ones could be found. (117) If native witnesses were admitted, foreign ones might also be present, in order to increase the solemnity; and, it was never imagined, that their presence could impair the validity of the proceedings. Such foreign

(116) L. Long. Caroli, M. 94. (Canc. i. 160.) Many other passages were formerly noticed, in n. 50. 51. & 53.

(117) Capit. 1. a. 819, art. 6. (Baluz. I. 600, supr.) The same rule was also admitted among the Lombardic laws. L. Long. Lud. Pii 14. (Canc. 1. 186. supr.)

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witnesses to solemn Gesta frequently occur in deeds. (118)

The Sachibarons ceased after the Counts were appointed by the King.

The darkest and most uncertain part of the whole inquiry, relates to the office of the Sachibarons; and our ignorance on this subject may endanger even the right apprehension of the Judicators themselves. It might be imagined, for example, that the Sachibarons in many of the tribes, were the substitutes of the Judicators, and the universality of the latter would thus be disproved. Fortunately, however, the Sachibarons occur only in the Salic Collection; and that law, at the same time, acknowledges the Rachinburgers as proper Judicators. According to another opinion, the Sachibarons were intrusted with the cognizance of the law, while the Rachinburgers tried merely the facts. (119) But, this doctrine is also erroneous; since, for the reasons already given, the appli-

(118) Thus, A. C. 864, a deed in favour of the Empress Engelberg is attested by witnesses of totally different nations (Muratori ant. Ital. T. 2. p. 241. c.); and, A. C. 885, Lombardic, Frank, and Roman witnesses attest the donation of a Lombard to the Roman cloister of Nonantola. (Tiraboschi storia di Nonantola, T. 2. p. 62).

(119) Eichhorn deutsche Rechtsgeschichte, Th. 1. §. 75. not. i. He there differs entirely from Savigny's account of the Sachibarons having been appointed by the king. Spence, also, mistakes the Sachibarons: Origin of Laws, p. 440. 451. note 2. Lond. 1826. 8vo.

cation of the law also was the prerogative of the Judicators. (120) The silence of deeds and forms is also quite fatal to the supposition of that department having been the special province of the Sachibarons. The following results may be deduced, from a careful comparison of the few passages, in which these functionaries are mentioned. The word does not denote a temporary occupation, but a permanent order: for, the Sachibarons are valued at a composition above that of the Judicators, and generally equal to that of the Counts. (121) In deeds, also, some of the witnesses have this title added to their names. (122) It is likewise certain, that the Sa-

(120) See above, p. 238: and Eichhorn, §. 258.

(121) L. Salica emend. T. 56. C. 2. 3. (Canc. ii. 149.) (antiqu. T. 57. C. 2. 3. ib. 98.) Likewise in L. Angl. Inae 6. "Si quis in ecclesia pugnet, 120 sol. emendet. Si in domo Aldermanni *vel alterius Sagibaronis* pugnet 60. sol. emendet et alios 60 pro wita." Ducange, vi. 46. med. adopts that text, upon the authority of Spelmann; but Wilkins' translation (Canc. iv. 236.) reads "Si quis in Senatoris domo pugnet, vel in alterius *illustris sapientis*, sexaginta sol. mulctetur. The Anglo-Saxon text, in Wilkins, p. 16., says merely—Gedungenes Witan." The term Ealdorman is sometimes translated by Comes, and at other times by Dux, in deeds of the 11th and 12th centuries. Phillip's Angelsäch. Recht. n. 258, 259.

(122) To a deed, A. C. 648, "Actum Ascio (al. Sithiu) in Brequigny diplomata, N. 122, p. 203, there are many witnesses, and among them, "S. Chuneberti graphionis . . . Mauriliani Sacebaronis . . . S. Radbaldi Sacebaronis. Asi-

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chibarons were connected with the judicial department. According to one text of the Salic Law, they decided the cases: which constitutes a resemblance between them, and the Judicators; (123) but, according to the other, and better reading, the judgment was pronounced in their presence, in the same manner as before the Count; and, a suit decided before them, could not again be tried, in the presence of the Count. (124) The true explanation of the term seems therefore to be:—while the Counts were elected, as in early times, by the people, the King appointed other magistrates, Sachibarons, with similar powers, but not limited to any particular district. Their jurisdiction, if not higher than that of the Counts, was so far concurrent with it, that the cases decided before the Sachibarons, were held as concluded, and could never again

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lendi Sac. Signum Isberti Sac . . . . . S. Anschiddi Sacebaronis."

(123) L. Salica antiqua T. 57. C. 4. (Georgisch p. 113, or Canc. ii. 98.) "Sachibaronus vero in singulis Mallebergiis plus quam tres esse non debent, et si de caussa illi aliquid sanum dixerint, penitus Gravio nullam habeat licentiam removendi."

(124) L. Salica emend. T. 56. C. 4. (Georgisch p. 114, or Canc. ii. 150.) "Sagibarones in singulis mallobergiis, id est plebs quae ad unum mallum convenire solet, plus quam tres esse non debent: et si causa aliqua *ante* illos secundum legem fuerit definita, *ante* grafionem removere eam non licet."

be brought on for hearing, before the Count. This hypothesis easily explains, why the Sachibarons fell into disuse. Their appointment became unnecessary, whenever the Counts were named by the King; and, they are not mentioned in the Ripuarian Law; because, that collection was undoubtedly made, after the period of their decline. It has been generally supposed, that the Sachibarons are synonymous with the Rachinburgers, but that opinion is at variance with the passages just quoted. Others believe, that they formed the Court of Appeal: (125) although, that supposition be contradicted both by all the authorities and by the fact of a gradation of Courts, or Judges of first and second instance, having never existed in the old judicial system of the Germans.

Only a single Elected Judge—Judex, was known among the Bavarians.

In the Bavarian laws, we find, along with the Count, a single Judex, or specially chosen person, possessing the same judicial functions with the Judicators of the other tribes. (126) This officer, although in many respects similar to the Scabini, bore no resemblance to the Sachibarons. Indeed, the more recent introduction of the former institution

(125) Wiarda Geschichte des salischen Gesetzes, S. 191.

(126) L. Bajuvar. T. 2. C. 15. §. 2. C. 16—19. (Canc. ii. 366.)—Eichhorn, §. 75. not. c.

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among the Bavarians, seems to have been so modified, as to invest only a single individual, at one time, with the proper judicial functions.

THE COUNT—GRAF, AND HIS DEPUTIES.

The Count was both a civil and military officer.

The official persons, who sat as Presidents in the Courts of the Judicators, without participating directly in the judicial functions, next demand our attention. On this subject also there is a wonderful coincidence, among the most different tribes. Every where, a public functionary performed these magisterial duties, within a definite district; and, in virtue of his office, commanded also the freemen of that district in war. This supreme local authority, equally the president in civil business, and commander in military affairs, shall be designated by the old name of Count, merely, for the purpose of preserving by that term a distinct idea of the object of inquiry, and without meaning to anticipate the remarks, regarding the titles actually used among the different tribes, which will find their proper places in the course of the discussion. It is not improbable, that the Count was originally chosen by the people,

(127) In some districts, the office may have been heritable, and, in all likelihood, more ancient and universal than that of King. (128) But, after the prerogatives of the Crown had been strengthened and enlarged, principally by the conquest of the Roman Provinces, the Counts were appointed by the Sovereign, and became the supreme local functionaries immediately under the King. Inferior to the Counts, were the different or-

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(127) Tacitus de Mor. Germ. C. 12. "Eliguntur in iisdem conciliis et *Principes*, qui jura per pagos vicosque reddant." From the following passage:—"Centeni singulis ex plebe comites, consilium simul et auctoritas, adsunt;" several critics have, with great appearance of probability, rejected the word—Centeni, as gloss. In that case, these Comites might be considered as Judicators; if they were not afterwards fully described—as the retainers. It is, however, very possible, that, in the accounts followed by Tacitus, the totally different institutions of Judicators and retainers had been confounded. Concerning the election of the President of the Courts, see Möser Osnabr. Gesch. Th. 1. Abschn. 1. §. 22. Abschn. 3. §. 32. not. a. That author maintains, (Abschn. 5. §. 36. not. c), that these official situations were annually filled; although the silence of Tacitus, and the opposition of an old Saxon authority, render this opinion improbable. (See below, p. 257. n. 144.) The passage of Otto of Freysingen, also, to which Möser refers (*hist. Frid.* I. L. 2. C. 13.), does not relate to the Counts, but to the Consuls of the free Lombardic cities, in the twelfth century.

(128) As a proof of this, we might refer to the alternative, "rex vel princeps," in Tacitus, l. c. C. 10. 11. See also the quotation from Bede in n. 144.

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ders of their assistants and deputies. The jurisdiction of some of these was limited to a small district, while that of others extended over the whole county. The relation, in which the Count stood to the Duke, has been already examined, and seems to require no additional observations. (128 a)

Grafio and Comes were synonymous titles of the Count among the Franks.

The existence of this Count among the Franks, under the names of—Grafio, Gravio, Graphio, is quite unquestionable. He is very often mentioned in the Salic law, and exclusively in the above capacities. The character of the notices, contained in the Ripuarian collection, shall be immediately explained; but, after the Frank conquest of Gaul, the term Comes is so frequently used in the place of Grafio, that we must commence our inquiries, by examining the mutual relations subsisting between these two titles. Most authors have maintained, that the Comes and the Grafio were originally different persons. Both terms, however, were from the first synonymous, or rather, Comes is merely the Latin translation of Grafio. The Franks wished to preserve their old national magistracy in their new conquests; and, the Romans naturally chose such of their own titles, as corresponded best with the powers of the

(128 a) See above, p. 173.

new dignitary. The names of the Roman civil ruler,— Consularis, Corrector, Präses, might have been adopted, if the signification of these terms had included the military powers of the Count, the most important half of his office. Moreover, the Franks, as neighbours, had become acquainted with the whole eastern boundaries of the empire before the Conquest, and were no strangers to the Comites of these frontiers, who were in fact Duces, with the office of the Comes conjoined. It thus happened, that the Roman officers, with whom they were the most familiar, corresponded the best with their own Counts. Both possessed a military command over a certain district; and the jurisdiction of the Count belonged likewise to the Comes, although, in a very inferior degree. (128 b) That this is the true opinion, and that they were not two different officers, but synonymous designations of the same functionary, appears to be distinctly proved by the following reasons. The Salic law speaks of the murder of the Grafio; and although, the same subject in the Ripuarian Collection is entitled, "De eo qui Grafionem interfecerit," (129) the text itself says: "Si quis judicem fiscalem, quem

(128 b) See above, p. 82. 83.

(129) L. Salica emend. T. 56. (Canc. ii. 149.)—L. Ripuar. T. 53. (ib. 310.)

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Comitem vocant, interfecerit," etc. While the Comes is frequently mentioned by Gregory of Tours, no notice is taken of the Grafio, (130)—an inexplicable fact, unless both terms be synonymous: for, will any person maintain, that Gregory could have written his book, without ever mentioning the old national dignitary of the Franks? In many royal Placita and proclamations, various orders of persons are addressed; and although, both the Comes and the Grafio are noticed separately, they never occur together. This circumstance can only be explained on the supposition of their identity. (131) The do-

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(130) This statement is made on the authority of the indexes in Bouquet, and in the opp. Gregorii. Ducange cites none of his illustrations from Gregory. On the other hand, Grafiones occur in Fredegar, C. 42. 74.

(131) A Placitum, A. C. 692. (Bouquet T. 4. p. 671. Brequigny diplom. N. 227), was attended by 4 Bishops, 3 Optimates, 2 Graviones, 2 Seneschalli, without a single Comes; for the Comes Palatii is a different officer. On the other hand, at a Placitum, A. C. 697, (Bouquet, T. 4. p. 676.—Brequigny, dipl. N. 238), no Gravio is noticed, while we are informed of the presence of—7 Bishops, 4 Optimates, 3 Comites, 3 Domestici, and 2 Seneschalli. The term Comes is exclusively employed in one Praeceptum, A. C. 629, (Bouquet T. 4. p. 627.—Brequigny dipl. N. 69)—"Dagobertus . . . Comitibus et omnibus agentibus nostris, vicariis, Centenariis," etc. While two others are addressed to the Graviones, A. C. 721 and 743: "Theodericus . . . viris illustribus Gravionibus seu et omnibus Agentibus," etc.

nation of Charlemagne to the Pope, is said to have been subscribed, for the purpose of greater solemnity, by all the Bishops, Abbots, Dukes and Grafiones, without the least mention of the Comites. (132) Our opinion is also supported by the singularly strong analogy regarding this officer and his name, which exists among all the other German tribes settled in the Roman Provinces. The Burgundians, West Goths, and Lombards, had only one functionary of this description; and the two former nations, as shall be afterwards shown, gave to the person, who filled that old and well-known situation among them,—the title of Comes. Another circumstance, of particular importance in this question, is the practice of the East Goths, who seldom afford such authorities. Notwithstanding their singular anxiety to adopt the policy of Rome, they retained, for the disputes of Goth with Goth, their old national functionary, under the characteristic title of—Comes Gothorum.

(Bouquet T. 4. p. 697. 710.—Brequigny dipl. N. 306. 344). The Graviones of the one, and the Comites of the other, are quite inexplicable, on the supposition of the terms having a different signification.

(132) Anastasii biblioth. Vita P. Hadriani T. I. p. 251. ed. Rom. 1718, fol. "Universos Episcopos, Abbates, Duces etiam et Graphiones in ea adscribi fecit." The leaders of the army had been mentioned shortly before, p. 248: "Duces nempe et graphiones."

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While arguing for the identity of the two terms, it is not our intention to maintain, that they were practically used in every case as synonymous. On the contrary, the one or the other title was employed, according as the Counts themselves were Romans or Franks, or, according as Romans or Franks predominated in the country, under their command. The latter circumstance alone, would be a sufficient reason for applying, exclusively, to the Counts of particular districts, the one or the other appellation. If this opinion, in itself so probable, be sustained, it is easy to explain all those passages, in which Comes and Grafio appear to be somewhat different. Such a distinction occurs in many of those Praeceptis, in which the whole classes of functionaries are named, to whom the order is addressed. (133) Among the Judicators

(133) Praeceptum, A. C. 496, or 497, (Bouquet T. 4. p. 615. Brequigny dipl. N. 2., where its authenticity is defended):—"Quapropter notum sit omnibus Episcopis .... Ducibus, Comitibus, Domesticis, Vicariis, Grafionibus, Centenariis," etc. Similar authorities, from the sixth, eighth, and ninth centuries, may be found in Bouquet, T. 4. p. 616. 716.—T. 5. p. 699. 733. 747. 763.—T. 6. p. 506.—T. 8. p. 473. 474. The Grafio in these cases never precedes the Comes, but sometimes immediately follows him; although, the Domesticus is more frequently inserted between them. The Praeceptum, A. C. 878, noticed by Bouquet, T. 9. p. 405. infr. is probably the latest, in which

appointed by the King to a Royal Placitum, there are several who bear the one or other of these designations. (134) The natural modification of the office, with regard to the dependant Romans, harmonizes perfectly with the opinion of the Grafio and Comes, being the same old national dignitary. Since the King possessed quite different and higher rights over the Romans than over the Franks, his officer, the Grafio, necessarily assumed a different attitude, according as the Romans or Franks predominated in his county; although, the office itself ever remained essentially the same. Some have supposed the Grafio to be different from the Comes, and to be an officer of inferior dignity. (135) But this is quite inconceivable, and is at variance with that passage of the Salic Law, in which the Grafio is declared to be the highest civil officer, and immediately under the King.

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the Graviones are mentioned:—"Ducibus, Abbatibus, Domesticis, Comitibus, Grafionibus," etc.

(134) At a Placitum, A. C. 693, (Bouquet, T. 4. p. 672. Brequigny dipl. N. 229 and proleg. p. CX.) the Judicators were 12 Bishops, 12 "Optemates," 8 "Comites," 8 "Grafiones," 4 Domestici, 4 Refendarii, 2 Seneschalli; with the usual addition of the Comes Palatii or Count Palatine—Pfalzgraf. The names of all these dignitaries are given. One Comes is called Jonatan; one Grafio, Aurilianus; but, all the other names of both these classes of officers are German.

(135) Brequigny diplom. proleg. p. CCIV.

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With more apparent truth, it has been said,—that the Grafio was originally the officer of the Franks; while the Comes continued to preside over the Romans, as a remnant of their ancient system,—until revolving years had abolished all distinctions. (136) Nevertheless, even this doctrine is untenable; both from the proof already adduced, of the identity of the two titles; and, from the total want of any thing resembling a real or complete preservation of Roman forms, in this office or its name. With such an intention, the Roman Praeses, etc. must have been continued in office over the Romans, and the civil power must have been constantly separated from the military; whereas, neither of these concessions were made by the Germans.

The Deputy of the Count was styled Tunginus, Centenarius, Vicarius, Vicetomes, Advocatus:

As Deputy of the Grafio, and under his control, the Salic Law notices an officer, by the name of Tunginus, or Centenarius—a term in use among the Romans. (137) His duties were pro-

(136) Eichhorn deutsche Rechtsgeschichte Th. 1. §. 24. med. and not. g. seq. Schöpflin also, in Alsatia illustr. T. 1. p. 774, maintains that, the Comes is a remnant of the Roman Constitution.

(137) The Tunginus or Tunzinus, is synonymous with Centenarius, and Tunginium with Mallus. They occur in the L. Sal. emend. T. 46. §. i. 48. 63. §. i. (Canc. ii. 145. seq.) (ant. T. 47. §. i. 49. 63. in Canc. ii. 86. seq.): and in L. Sal. ant. T. 53. §. 2. (ib. 94); but the L. Sal. emend. T. 52.

bably limited to a certain part of the county; and under each Count, consequently, there were several Centenarii. These did not, however, form an Inferior Court, from which an appeal might be taken to the Count. The distinction rather seems to have been, that while—the higher offences,—individual liberty,—and the rights of property in land or in bondmen, were incompetent before the Centenarii, the jurisdiction of the Count was entirely unlimited. (138) Besides these regular deputies, there were others of a less accurately defined character, although always under the above limitations. Their authority was sometimes confined to particular districts, (139) and at other times, was coextensive with the county. (140) These depu-

§. 2. reads—Judex. (ib. 147.) Tunginus is never used in deeds, but only Centenarius, which is the favourite term from the fifth century downwards. See above, p. 252. n. 133. Wiarda, Gesch. des Sal. Gesetzes S. 186,—erroneously separates the titles, and applies them to different offices. The Roman application of the term Centenarius, towards the end of the fourth century, is remarkable. Vegetius de re milit. II. 8. "Erant enim centuriones, qui singulas centurias curabant; qui nunc centenarii nominantur. Erant decani, denis militibus praepositi: qui nunc caput contubernii vocantur."

(138) Cap. III. a. 812. art. 4. (Baluz. i. 497.) Eichhorn deutsche Rechtsgesch. Th. 1. §. 74.

(139) Thus, "in pago Parisiaco, in vicaria Buciaxinse.:" from a deed, A. C. 855, (Baluz. II. 1464. N. 76.)

(140) The Capitularies of the Franks are silent on the subject; but an authority is found in the L. Longob. Caroli

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ties are most commonly styled Vicarii among the Franks, and such is their uniform designation in the Royal diplomas, along with the Dukes, Counts, etc. Vicecomes is likewise used, in the same sense, in the Royal diplomas, but more rarely, and not as the uniform title of a distinct order. (141) Advocatus, which appears to be the phraseology of the Saxon provinces, has also the same signification. (142) All these deputies, both preceding and about the time of Charlemagne, were appointed, not by the King or by the Count, but by the people, under the superintendance of the Missus and the Count, although the Count himself was exclusively nominated by the King. (143) The character

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M. 69. (Canc. i. 157.);—an ordinance, probably later, and introduced by Charles, from the Frank Laws, into Italy.

(141) Examples may be found, in the references contained p. 250, in n. 131. 133. It is remarkable, that many deeds of the sixth and seventh centuries, in which Vicecomes is used, are certainly spurious. Brequigny dipl. N. 7. 8. 12. 18. 19. 54. 75. From the ninth century, this term gradually becomes of more frequent occurrence, and particularly in the Southern Provinces. Bouquet T. 8. p. 473. 474.—Ed. Pistense, a. 864. C. 14. (Baluz. ii. 179.)—Brequigny Table, T. 1. p. 460. 465. 468 486. &c.

(142) Möser Osnabr. Gesch. Th. 1. Abschn. 4. §. 7. not. a. b.

(143) Cap. II. a. 805. art. 12.—Cap. III. a. 805. art. 14.—Cap. I. a. 809. art. 22.—Cap. II. a. 809. art. 11. (Baluz. I. 426. 432. 466. 472.) On the other hand, in the time of

of the jurisdiction appertaining to the Duke, in the Empire of the Franks, has been already illustrated. (143 a)

There were Counts among the Saxons, Bavarians, Burgundians, West Goths.

The Saxons, before their union with the Frank Empire, were ruled by officers resembling the Counts, with uniform and permanent public duties. Their precise titles, indeed, are unknown; although, it is certain, that their command, as generals of the army, endured only for a single war. (144) Among the Bavarians, Graviones occur towards the end of the seventh century, (145)

Louis le Debonnaire, it is said by Agobardus ad Matfredum of the Comes Bertmund, "Quippe qui bene satis habeat ordinatum de Justitiis Comitatum suum; eo quod talem virum *pro se constituerit* ad haec peragenda, qui . . . id strenue gerat." (Bibl. Patr. Lugd. T. 14. p. 283.) The practice appears, therefore, to have been changed.

(143 a) See above, p. 173.

(144) Beda in eccles. hist. gentis Anglorum, lib. 5. C. 11. "Non enim habent regem iidem antiqui Saxones, sed *satrapas* plurimos suae genti praepositos, qui ingruente belli articulo mittunt aequaliter sortes, et quemcunque sors ostenderit, hunc tempore belli ducem omnes sequuntur et huic obtemperant: peracto autem bello, *rursum aequalis potentiae omnes fiunt satrapae.*" The Contrast, in this passage, between the temporary employment of Duke (temporary among the Saxons, as among the other German tribes), and the permanent office of Count, is of a character to show, that the latter must have become either heritable, or capable of being bestowed for life.

(145) Paul. Diaconus hist. Long. L. 5. C. 36. (during the reign of the King Cunibert, who died A. C. 700) "Hic . . .

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and they were probably an old national institution. The Burgundian Comes was the highest regular officer in the different subdivisions of the country, and stood immediately under the King. His jurisdiction extended equally over Romans and Burgundians; for, the prologue to the Burgundian laws, subscribed by 32 Comites, mentions, as the highest magistrates in the judicial department, "tam Burgundiones quam Romani civitatum aut pagorum Comites." Among the West-Goths, also, the Comes was the highest regular local authority for Goths and Romans equally. (146) Under him, there stood a long gradation of subordinate officers; but, in this respect, as in most others, the West-Goths seem to have followed a new and artificial arrangement. (147) By a univer-

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cum Comite Bajoariorum, *quem illi Gravionem dicunt* . . . conflixit."

(146) The Breviarium, or the Law of the West-Gothic Romans, was sent by the King to several Comites for their guidance. (See below, Chap. viii. §. i.)

(147) L. Visigoth, Lib. 2. Tit. 1. L. 26. (Canc. iv. 73.) ". . Dux, Comes, Vicarius, pacis assertor, tyuphadus, millenarius, quingentenarius, centenarius, decanus, defensor, numerarius . . . . judicis nomine censeantur ex lege." The authorities in the next Note, where the Comes is always represented as the supreme local functionary, prove the jurisdiction of the Dux, in this passage, to have resembled that of the same officer, among the Franks.

sal principle of the Germanic constitution, therefore, the Comites possessed both civil jurisdiction and military command. (148)

And Anglo-Saxons.

Of the Anglo-Saxons we possess the following accounts, but only from the eleventh century. Every ten men formed a small community, called Friborgus, and in it one of them held the office of President, as Friborges heofod. (149) Ten Fribourgs—a hundred men, or a Tithing, were ruled by a Decanus, Tienheofod, or chief of ten. A hundred Fribourgs, or a thousand men, formed a Hundred, or Wapentake, and were ruled by the Centurio, or Centenarius. The Decanus possessed jurisdiction in the inferior causes, and the Centenarius in all, even in the most important. (150) These officers stood in the same

(148) Besides the authorities in the preceding Note, we may refer to the following. L. Visigoth, Lib. 2. Tit. 1. L. 14. 17.—Lib. 7. Tit. 4. L. 2.—Lib. 9. Tit. 2. L. 1. 3. 4. 5. (Canc. iv. 69. 147. 168.)

(149) See above, p. 210, and the authorities in n. 61. 62.

(150) LL. Eduardi 32. 33. (Canc. iv. 340.) A. C. 1042–1066.—L. 32. " ... Statuerunt justitiarios super quosque decem friborgos, quos decanos possumus appellare, Anglice vero *tienheofod* dicti sunt, i. e. caput de decem. Isti inter villas et vicinos causas tractabant, " &c. And afterwards ; .. quos supradicti sapientes super eos constituerant, scilicet super decem decanos, quos possumus dicere centuriones, vel centenarios, eo quod super centum friborgos judicabant." Decanus and Centenarius are almost universally explained, as the Judges over ten and a hundred persons. See Wil-

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relation to each other, as the Centenarius to the Count, among the Franks. The Comites and Vicecomites commanded both the Decani and Centenarii; but, unfortunately, the pre-

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kins Glossarium, v. Centuria (Canc. iv. 428.)—[Spellman. Gloss. 274.—Ducange, ii. 1325. 1331.—Blackstone, i. 115. —Tomlins. v. Hundred and Tithing—Reeves, i. 10.—Spence, 353.—Millar, i. 173. 177. 181.—Hume, chap. 2. p. 92.—Hallam, ii. 391.—and nearly all the English authorities. The last author considers the statement of the Confessor's Laws as—"hardly tallying, with what the genuine Anglo-Saxon documents contain, as to the judicial arrangements of that period."] The passage really describes these Judges, however, as presidents over ten or a hundred Fribourgs, and not over ten or a hundred individuals. Now, each Fribourg was a union of ten persons. See above, p. 210. n. 61. 62. The number of Judges would, indeed, have been immense, if one had been appointed for every ten men. [Phillips, the last commentator on the Anglo-Saxon Law, also points out the mistake, which has been committed, in viewing the Tything and the Fribourg, as synonymous. Angels. Recht. n. 266.—Professor Kolderup Rosenvinge, in his Edition of the Old Text of the Laws of Canute, (Hauniæ 1826. 4to.) §. 20. (19.) note 6., notices the variation of the Anglo-Saxon Text, and states distinctly, that a Tything is 100 men, or 10 Fribourgs.] Concerning the names, Centenarius and Decanus, see above, p. 255. n. 137. fin. The resemblance which the Caput Contubernii, there mentioned by Vegetius, bears, either to the Friborgus Heofod, as commander of 10 freemen, or to the Tien Heofod, as commander of 10 soldiers, is very remarkable: for, if each Fribourg sent only one man to the national army on common occasions, the terms, Decanus and Centenarius might, in perfect accordance with Roman phraseology, be understood with reference to that obligation: and, the Tienheofod would then be the—Caput Contubernii.

cise character of this superiority is nowhere clearly explained. (151) The introduction of this arrangement is generally ascribed to King Alfred; although, his innovations ought rather to be viewed, as the extension and improvement of an old national system. The Duke, among the Anglo-Saxons also, was merely a temporary office, during the continuance of the war. (152)

The Lombardic Count was called Judex, Comes, Dux: his county, Judiciaria; and his subjects, Pagenses.

It still remains to consider the Lombardic public authorities, who appear in the common accounts so perplexed and incomprehensible. Besides the inferior magistrates, the Lombards are said to have had the following local functionaries:—Duces Majores, Duces Minores, Comites, Judices; and, none of these stood in any definite subordination to each other. This opinion, of itself sufficiently absurd, has originated in the attempt

(151) LL. Eduardi C. 12. 13. 21. 35. in f., (Canc. iv. 336. 339. 342.) A passage in C. 35. init. narrates, "Greve quoque nomen est potestatis, Latinorum lingua nihil expressius sonat quam praefectura, quoniam hoc vocabulum adeo multipliciter distenditur quod de Scyra, de Wapentachiis . . de hundredis, de burgis, etiam de villis Greve vocetur. In quo idem sonare videtur, et significare quod dominus." In the same manner, the title Greve, or Grebe, signified, even recently, in many parts of Germany, a kind of village police-magistrate,—Dorfvorsteher. Greve is the same word with the Gravio of the Franks; and the extended signification, here given to it, is quite accidental.

(152) LL. Eduardi C. 35. §. de heretochiis (Canc. iv. 342.)

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to investigate the subject, without previously ascertaining the meaning of the technical language. (153) In order to expose its fallacy, it will be necessary, therefore, to take an opposite course, and begin by considering the phraseology in the old Lombardic laws of the native princes. The single term Judices, used in nearly all the prefaces to these laws, may denote either the highest magistrates, or the whole members of the judicial establishment. Some passages in the laws themselves, however, remove this ambiguity. Judex is the highest local authority under the King, and is both the Judge and General of his countrymen. Under him, stood other district officers, with corresponding twofold powers; besides these, there was also a Dux; but, his authority was neither permanent, nor locally restricted. Specially appointed for each war, as general of the army, he possessed only extraordinary jurisdiction over the troops, under his immediate command. (154) The

(153) Muratori, (ant. It. T. 1. diss. 5. 8. 10.) as usual, presents the reader with excellent materials, and often also with perspicuous views; but, destroys their value, by subsequent vacillation. Lupi (cod. dipl. Bergom. p. 131. 453. 561.) confuses the whole doctrine, and wanders about, among names and subjects, in an endless circle. The most correct account is given by Canc. iv. 218. sq., in his preface to the Anglo-Saxon Laws.

(154) A, The Dux possessed authority merely in the army,

term Comes, which never occurs in the laws, is frequently found in histories and deeds: but, these again omit the Judex. (155) Farther, Paulus Diaconus states, that after the death of King Cleph, A. C. 575, no king was chosen during ten years, and the Dux of each of the 35 city-domains, governed his

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and without reference to a fixed portion of country. There was a Judex also along with him in the field, but his authority was partial, and extended only over the freemen of a district. See L. Long. Rotharis 25. (Canc. i. 66): "Si quis res suas ab alio *in exercitu* requisierit, et noluerit illi reddere, tunc ambulet ad ducem; et si *dux* ille, aut *Judex qui in loco ordinatus est a rege*, veritatem aut justitiam non conservaverit, componat" etc. cf. L. Long. Rotharis 6. 20. 21. 23. 24. (l. c. 64—66.)—L. Long Liutprand. VI. 29. (l. c. 119.) B, During peace, the Judex was the highest Judge immediately under the King, in a fixed Judiciaria; and, below him, there were several—Schuldasii, &c. Neither a Dux nor Comes, therefore, could occur in that system. See L. Liutprand IV. 7. 8. 9. 10.—V. 15.—VI. 31.—(Canc. i. 107—120.)

(155) As examples, see—A Diploma by Aistulph, A. C. 755, "et nullus dux, *comes*, gastaldus," etc. (Lupi cod. dipl. Berg. p. 437. 438).—Another Diploma of the same King, A. C. 753 or 754 (Tiraboschi Storia di Nonant. T. 2. p. 15.)—A Deed, A. C. 752 "in *comitatu* Motinensi vel Bononiensi" (Tiraboschi l. c. p. 19.)—Another deed, about A. C. 753, "infra hac civitate Cremona quamque et foris per totum ipsum *comitatum*," (Tiraboschi, l. c. p. 20). In Paulus Diaconus III. 9., mention is made of a Comes Ragilo of Lagara; and, in IV. 53. V. 16, a Comes of Capua occurs. Other authorities may be found in Muratori ant. It. T. 1. p. 402.

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territory, with independent power. (156) The supposition of these Duces being so many different local authorities, of the same rank, and superior to the Count, is not only improbable, but contradicted by the laws, which place the Judices immediately under the King. The following explanation, however, seems to remove all difficulty. The Lombards had their Counts, like the other tribes, although their Lombardic title be unknown. Grafio was not the term; since, their historians specially notice the use of that expression among the Bavarians. (157) Judex Comes, Dux, are the different Roman translations of the unknown Lombardic title, and may therefore be considered as supplying, in some degree, our ignorance of the original. Judex aptly expresses the civil power of the Count; for,

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(156) Paulus Diaconus, Lib. 2. C. 32. "Post cujus mortem Longobardi per annos decem regem non habentes sub ducibus fuerunt. Unusquisque enim ducum *suam civitatem obtinebat*. Zaban, Ticinum: Uvaillari, Bergamum: Alachis, Brixiam: Euin, Tridentum: Gisulfus, Forum Julii. *Sed et alii extra hos in suis urbibus triginta duces fuerunt.*" There were, consequently, altogether 35 Duces; and of these, five are named, merely by way of example. The whole affair is commonly said to have been a revolutionary usurpation: but, it may, with much more reason, be viewed as a temporary return to the oldest constitutional practice of the nation. See above, p. 247. n. 128. and p. 257. n. 144.

(157) See above, p. 257. n. 145.

even during the Roman times, the Imperial Governor of a Province was styled—Judex or Judex Ordinarius. (158) Comes had here the same origin, as among the Franks. (158 a) Dux might be chosen for similar reasons; since, the duties of both the Dux and Comes were frequently conjoined, and formed into one office. Indeed, the proximity of the Exarchate might have afforded a special reason for the use of the term Dux; for, the Duces of Ravenna possessed, like the German Counts, a certain degree of Civil Jurisdiction, along with their military power. Still, it must not be conceived, that these titles depended merely on the arbitrary translations of authors. Probably, the Counts themselves preferred the one or the other, according as they happened, at different periods, to be more or less in vogue. The Duces Majores are quite different from the Duces Minores, Comites, and Judices. The two countries of Benevento and Spoleto (159) were only slightly connected with the Lombardic Empire, and were governed by a sort of tributary kings, called Duces. These stood in a similar situation with the Duces of the Ba-

(158) See above, p. 81.

(158 a) See above, p. 248.

(159) Friuli did not form a third, until the time of Charlemagne. Muratori ant. It. T. I. p. 167. D. 168.

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varians and Alemans, in the empire of the Franks. They were mere anomalies, not belonging to the constitution of the parent state, in which the old national characteristics are most likely to survive, but created for the purpose of supplying some local and temporary want. The ordinances of the Lombardic kings could be enforced only within their own realms. Benevento had its separate legislation. These Duces Majores are, therefore, as different from the 35 Duces of Paulus Diaconus, as the mere generals are, who bear the same title in the Lombardic laws. The district, under the Count, was called Judiciaria; and the Lombards, like the Franks, gave to the freemen, residing within it, the name of—Pagenses. (160) Since Italy, from the earliest times, consisted of cities with territories attached to them, these Judiciariæ may have generally coincided with the city domains; and, the frequent notices of Counts, in connection with particular cities, arose probably from this cause. (161) The coinci-

(160) Regarding Judiciaria, see—L. Long. Liutprand V. 15. (Canc. i. 3.)—Pipini 8. (l. c. 175, and iv. 223.) Regarding Pagenses, see—L. Long. Caroli M. 67.—Pipini 8.—Lotharii sen. 56. (Canc. i. 157. 175. 201.) The Pagenses of the Franks are mentioned above, p. 204. n. 53.

(161) As in the quotation from Paulus Diaconus, in n. 156. The ambiguous passage—"Civitatum aut pagorum comites," in the prologus L. Burgund., (Canc. iv. 13. med.)

dence, notwithstanding, is merely accidental; and, few greater mistakes could be committed against the spirit of the old Germanic constitutions, than to suppose, that the Lombardic Counts were city dignitaries.

The Sculdasii and Decani, were the Deputies of the Lombardic Counts.

Under the Counts, there were regularly several Sculdaesi or Sculdascii, and again, below these, Decani. Each had his fixed Sculdasia and Decania, and both, like the Counts, possessed civil and military power. (162) In the large royal domains, the Gastaldii, Gastaldiones, or local collectors of the King's rents,

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must be translated, in conformity with the above distinction, and not—that the Burgundians had two classes of Counts, a civic and a rural.

(162) Concerning the Sculdasius and Decanus, see—L. Long. Liutprandi V. 15.—VI. 29. 31.—Pipini 10. (Canc. i. 112. 119. 120. 176.) Sculdasia and Decania are explained in Canc. iv. 219. 221.—Muratori (ant. It. T. 1. p. 522, B.) properly remarks, that the—Sculdasius of the Lombards corresponds, with the Centenarius of the Franks. On the other hand, he is wrong in maintaining, p. 506, seq., that the jurisdiction of the Scabini in the cities was of the same character with that of the Sculdasii in the country. The former, since the Frank Conquest, sat in all the Courts along with the latter; and the presence of the Count, as President, still continued indispensable. When, therefore, in some of the passages quoted by Muratori, the Scabini appear at the head of the Court, they are certainly the Vicarii, or Missi, of a Count. Sismondi, (Rep. It. i. 73. n. 2. and p. 371. med. Paris. 1826.) is particularly unfortunate in his remark, that the Frank Scabini were called by the Lombards,—Sculdaesi, &c.

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may have exercised the duties of the Count over the Freemen, in the district where they resided, along with their own proper functions. The Saltarius, also, is found in the place of the Decanus. Besides their superintendence over the king's forests, the Saltarii may have acted, as sub-inspectors of the freemen. (163)

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(163) The Saltarius, as a public officer, occasionally occupying the place of the Decanus, occurs in the laws already noticed, n. 162. Canc., iv. 219, is unwilling to believe, that a mere superintendant of forests should have been at the same time a Magistrate. In order to avoid this supposed difficulty, he derives the word (p. 220. med.) from the German—Schalten, to impel, and compares this Schalter with the West Gothic—compulsor exercitus. The most instructive passage, concerning the Saltarius, is found in a judicial examination of witnesses, A. C. 1218, in Tiraboschi Storia di Nonantola N. 420. p. 356. In the process itself (p. 355), it had been decided, that the inhabitants of the city of Crevalcore had a right to send, into a certain part of the forest, " neque silvanos neque saltarios vel gualdumannos." The depositions state, that " Rolandus Rubeus . . . interrogatus quid appellatur *gualdemannia*, respondet quod illud quod datur *Silvanis* vel *Saltuariis* ab incidentibus publice ligna, scilicet eo tempore, quando datur licentia omnibus incidendi, et ipsi statuunt quantum quis debeat dare pro carro lignorum. Oriolus de Crevalcore etc. Interrogatus, si est differentia inter *gualdemannos* et *silvanos* et *saltuarios*, respondit, quod sic est, quia illos appellant *Silvanos* et *gualdemannos* qui stant in nemore, et vendunt lignamina, et accipiunt certum quid de colibet carro, *Saltuarios* appellant illos, qui custodiunt blavas et nemus pro communi eorum terre, et nemus est banditum pro communi sue terre," etc.

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After the Frank Conquest, the Frank titles were introduced into Lombardy.

The Frank kings introduced their own titles into Lombardy, and thus created a confusion, in the nomenclature of the public authorities. Comes still continued to designate the Count; but, under him, besides the former Sculdasii and Decani, we find the Frank—Vicarii, Advocati, and Centenarii. The character of all these officers is essentially the same, as among the Franks. The jurisdiction of the Vicarius, and of the other inferior functionaries, was limited to the same trivial questions; and, the mode of appointment was also similar. (164) The Dux had

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In the same manner, during the thirteenth century, Saltarii were appointed for the district around Ravenna, and their duties are precisely defined in the Statutes. Fantuzzi monum. Rav. T. 4. p. 53. The magisterial functions of the old office, however, were then on the decline, along with the other parts of the original Constitution.

(164) L. Long. Caroli M. 22. 55. 69. (Canc. i. 151. 156. 157.)—Judex, from this time forward, as has been already shown, p. 235. sup., most frequently signifies the—Scabinus; but, sometimes, the magistracy in general; and, often, an inferior functionary under the Count:—L. Long. Caroli M. 9. 99. 147. &c.—(l. c. 149. 161. 168. &c.) The same persons are also styled Juniores Comitum:—L. Long. Caroli M. 121. (l. c. 164.)—Pipini 17. 22. (l. c. 177. 178.) Many of the public officers mentioned in the laws, either never existed in Italy at all, or continued only for a short time. Spittler maintains (Staatengesch. Th. 2. S. 47.) without any evidence, an extremely improbable opinion,—that the Centenarius was a magistrate, under the Schuldasius. In the old Lombardic times, to which Spittler intends his theory

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now become a permanent and local military officer without civil jurisdiction, although of higher rank than the Comes. The union of the office of Comes in the person of the Dux, an event of frequent occurrence, may satisfactorily explain those cases, in which jurisdiction is attributed to the latter; (165) or, in which, both titles are applied to the same individual.

The Lombardic Schuldasii seem to have been a general institution.

At the very commencement of this inquiry, it was plain, that the researches, concerning the officers of the old Germanic courts and constitutions, could not, on account of the absence of trust-worthy authorities, be rendered complete. There are, indeed, many defects, which it is hardly possible to supply; and, of these, one example may suffice. The office of Sculdasius has the appearance of being quite peculiar to the Lombards, and none of the other systems seem capable of admitting such an institution. The universality of this office in German cities,—its continuance even in recent times, and—its adoption in the villages of many districts, may convince us, notwithstanding, that it was of high antiquity, and common perhaps to all the German

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to apply, a Centenarius is never mentioned. The title Vicecomes was commonly used in Italy, instead of Vicarius. The former constantly occurs in the diplomas of Ughelli, &c.: while, the latter is seldom, or never employed.

(165) Muratori ant. It. T. 1. p. 409. supr.

nations. In an Osnabrück deed, A. C. 804, Scultetus occurs, as an ordinary magistrate of the district. (166) Otfried also uses, several times, the word Sculdheizo, to denote a military leader; and, this indicates the existence of that officer, during the ninth century, in the empire of the Franks. (167) Finally, the same office is mentioned, in Burgundian and Rhetian deeds of the tenth century. (168)

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(166) "Dux, Comes, vel Vicecomes, vel *Scultetus*." Möser Osnabrückische Geschichte Theil. i. Documenta. Nr. i. p. 405. Berlin, 1798. Along with this circumstance, however, the remark must be conjoined,—that, in the Saxon provinces, there were no Centenarii. Möser l. c. Abschn. 4. §. 7. not. a. b.

(167) Otfried, Lib. 3. C. 3. & Lib. 4. C. 34. in Schilter thesaur. T. 1. p. 160. 308. Canciani, iv. 220. infr., has quoted the passages.

(168) Scultatia is found in a Rhetian deed, A. C. 976; and Sculdasii, in a deed of the King Rudolph III. of Burgundy, A. C. 997.—Müller. Schweizergesch. B. 1. C. 12. n. 336 and 44.

CHAPTER V.

ROMAN JUDICIAL SYSTEM AFTER THE GERMAN CONQUEST.

CHAP. V.

The Supreme Magistracy only of the Romans was subverted in the principal German kingdoms.

THE judicial system of the Romans, before the overturn of the Western Empire, and the old arrangement of courts among the Germans, having been already explained (a), we now proceed to examine the institutions of the new kingdoms, formed by the union of the victors and the vanquished. The supreme authorities of the Roman constitution, on which the connexion of the whole as a political system depended, were overturned in the Germanic kingdoms of great extent and long continuance. That the contrary happened, in the brief empire of the East-Goths, and partly, also, in some provinces of the Franks, shall be afterwards noticed. (b) With these exceptions, however, the Rectors of the Roman provinces totally disappeared among the Lombards and Franks after the Conquest;

(a) See above, Chap. II. IV.

(b) See below, n. 69. 88.

and German Counts, with civil and military power over both Germans and Romans, occupied their places. The questions now arise, how far the destruction of Roman institutions descended; and, whether the jurisdictions of the Civic Communities, with their Councils, Duumvirs, or Defensors, were also swept away? The answers are, regarding France, divided; but, no dissentient voice has ever been raised to maintain the fact of their preservation in Italy. The uninterrupted continuance of these municipal establishments, although hitherto denied, is, nevertheless, the only opinion entitled to our belief; and, while reserving the particular evidence on which it rests, until treating of the kingdoms separately, the general proof may be stated at present.

The Germans had no wish to extirpate the Romans.

If the purpose of the Victors had been to extirpate or Germanize the Romans, the destruction of their whole constitution must have followed, as a necessary consequence. Such intentions, however, were equally at variance with the personal laws, (c) and with the practice followed in disposing of the land. If, as many modern authors maintain, all property in land was taken from the Romans, the preservation of the peculiarities of their constitution would be rendered

(c) See above, p. 99.

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very improbable. The removal of the mistakes on this subject is, therefore, intimately connected with our leading purpose. How little the annihilation of the old national peculiarities of the Romans was either desired or effected by the Germans, is proved likewise,—by the preponderance of Roman elements in the new-formed language of the united victors and vanquished, and—by the continuance of the Roman law among the subdued Provincials. (d) This last circumstance, indeed, necessarily implies the preservation of some parts of the constitution; since, it is inconceivable, that the Roman law could continue in practice among the old subjects of the Western Empire, after the destruction of their whole judicial system.

The German Centenarius, or Sculdasius, resembled the Roman Duumvir, or Defensor.

The City magistracy of the Romans might very easily and simply be grafted, upon the Germanic system. The powers of the Centenarius, or Sculdasius, were narrowed by those of the Count; and, the Duumvirs, or Defensors of the Romans, scarcely possessed a more extensive jurisdiction. (e) If, therefore, the supreme local functionary of the Conquerors superseded the Præses, by this change, the Count became the common magistrate of Romans and Germans. Under him, the latter had their Centenarius, or Sculdasius, with

(d) See above, p. 109, seq.

(e) See above, p. 36. 71. and 255. 267.

their subordinates; and the former, their Duumvir or Defensor. Farther, assuming that, during the existence of the Western Empire, the Decurions had begun to attend the courts as assessors, they resembled both —the old German Judicators, Rachinburgers, Arimen, and—the elected Scabini of Charlemagne. Like the Judicators, they were the only proper citizens; (f)and, they were chosen from the other freemen, like the Scabini. These Roman Decurions may, perhaps, have been the real occasion of the elected Scabini becoming a permanent institution among the Franks. The comparative situation of the Decurions, among their own countrymen, was undoubtedly more agreeable and respectable after the Conquest, than under the Emperors. The Romans and Germans stood in different degrees of dependence on the Count, who probably succeeded also to the right of hearing Appeals, from such of the Roman city courts, as were formerly subjected to the Imperial Governor of the Province; (g) although, from the circumstance of appeals having been unknown to the Germans, it is possible that in many cities, the Romans may have been deprived of that right altogether.

(f) See above, p. 23. 88. 95.

(g) See above, p. 42. 84. and 253.

CHAP. V.

The German Scabini, and the Roman Decurions, continued long in the cities together.

Muncipial communities were, for a long time, unknown to the Germans. Originally ignorant of that mode of life themselves, they shunned it, when found among others. (1) Even, after this aversion had begun to decline, they became rather residenters than citizens; and, perseveringly continued to connect themselves with those various district-associations, already described among the Lombards. (1 a) In numerous deeds of the eighth and ninth Centuries, Habitator, or some similar expression, is added to the names of Germans living in cities: (2) probably, for the purpose of distinguishing these casual inhabitants from the Romans, the true citizens; (3) although, no very

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(1) Tacitus de Mor. Germ. C. 16. "ne pati quidem inter se junctas sedes." Ej. hist. Lib. 4. C. 64.

(1 a) See above, p. 171. 176. seq. 267.

(2) Tiraboschi Storia di Nonant. T. 2. N. 7. p. 19.: "Ego . . Ariprandus *habitator* de hac civitate Cremona . . . qui professi sumus ex natione nostra lege vivere *Langobardorum*." —Fumagalli cod. dipl. S. Ambros. p. 201.: "Signum manus Aribaldi de ex genere *Francorum avitator* civitatis Mediolani."—ib. p. 233.: "Halcario de ex genere *alamannorum abitator* vico Samoriaco." Similar examples are found in—Fumagalli, l. c. p. 235. 263. 267. 282. 301. 323. 522.—Lupi, p. 675. 781.—Ughelli, T. 4. p. 339.—Muratori ant. It. T. 1. p. 1011.—Antich. Estensi, P. 1. p. 117.

(3) *Cives* regienses and *de civitate* cremona, *de civitate* placentia. In Tiraboschi storia di Nonantola, T. 2. Num. 43. 46. 47, from deeds of the ninth century.

strong argument can be drawn, from this use of the technical language. These German Residenters may have gradually formed themselves, in each city, into separate and intimate associations, similar to the Roman Communities, but under the controul of elected Scabini, according to the new German form. The last step in the process of amalgamation was completed, when the whole inhabitants of a city, whatever might be their origin, formed themselves into one general community;—a change embracing equally the College of German Scabini, and the Ordo of Roman Decurions. The Roman Scabini or Judices, distinguished in early processes from those of the Germans, were the Decurions of the Roman cities; while in later deeds, they must be viewed, as the members of the Council of the New Community, including both nations. Among them, the recollection of a difference in descent might for a while survive, as we find that it did, even under the feudal systems. These notices of the Roman Scabini or Decurions, afford the most decisive evidence of the continued existence of the Old Corporate Institutions. Upon the revival of the Italian cities in the eleventh and twelfth Centuries, the College of Scabini, having universally lost all connection with the other branches of the constitution, became antiquated, and

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continued in an isolated and unchanged condition, until very recent times, under the name of—Collegio de' giudici; just, as many of the Judicator-Tribunals—Schöppenstühle, survived in Germany. (4) The Ordo, or the Proper Council, on the other hand, felt the spirit of reform, which pervaded the municipal institutions, and underwent, in a short time, so many arbitrary changes, that hardly any traces of its old character were preserved. If this account be accurate, the remarkable period is fixed, in which the public distinctions, and political privileges of Germans and Romans disappeared, and new nations arose from the formerly separated races. After the statement of these general principles, the individual kingdoms, founded upon the ruins of the Western Empire, next demand consideration; and, although this inquiry ought, in strictness, to be confined to the Germanic realms, it must be so far generalized, as to include the Byzantine provinces in Italy, on account of their close connection with the principal subject.

(4) Thus, in Bologna there were, until recent times, three different Law-Corporations: namely—two Collegia Doctorum, or promotion-faculties, for the Roman and Canon Laws, and—the Collegium Judicum et Advocatorum. In the last, the mention of the Advocati seems to be subsequent to the regeneration of the Lombardic cities; but, the Judices are, undoubtedly, the Carlovingian Scabini. Similar Colleges of Justice were long preserved, in a great number of cities.

SECTION I.

UNDER THE BURGUNDIANS.

AMONG the Burgundians, the following rule prevailed, concerning the Roman rights of property in land. Immediately after the Conquest, the land was partitioned, between the Burgundians and Romans. Of the house, offices and garden, the Burgundian received the half; (5) of the cultivated land, two-thirds; and of the bondmen, one-third. (6) Woods remained common property. (7) The free Burgundians, who came later, received, without any of the bondmen, half of the cultivated land; (8) and the manumitted Burgundians got merely a third. (9) These authorities prove, that there was an actual separation of the rights of property, (9 a) and

The terms —Hospes, Sors, Hospitalitas, refer to the Burgundian partition of the Roman lands.

(5) L. Burg. T. 54. §. 3. (Canc. iv. 30.)

(6) L. Burg. T. 54. §. 1. (ib. 29.)

(7) L. Burg. T. 13.—54. §. 2.—67. (ib. 17. 29. 32.)

(8) L. Burg. addit. II. L. 11. (ib. 41.)

(9) L. Burg. T. 57. (ib. 30.) "Burgundionis libertus, qui . . . . nec *tertiam* a Romanis consecutus est" . . . i. e. he who had not yet received his share.

(9 a) Meyer (esprit des Inst. Iudic. T. 1. p. 275.) assumes, on the contrary, that all the Germans adopted only communio pro indiviso. Most of the authorities upon this

CHAP. V. §. 1.

that the first partition of the land did not exhaust the whole; since, in that case, none could have remained for the freemen subsequently arriving, and for the manumitted. This last circumstance is plain, from the whole account of the mode of division. All the estates were not at once broken down into these portions, and completely divided among the Burgundian claimants actually present; but an estate was assigned to each Burgundian, and with him the Roman proprietor was obliged to divide it, in the manner already mentioned. (10) Indeed, Marius

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subject are indeed rather indefinite; since, the common expressions pars tertia, &c. may refer to a pars indivisa, as well as a pars divisa. Nevertheless, it is hardly possible to doubt the fact of a complete partition. A permanent communio was too artificial an arrangement for these times, and must have been equally troublesome to both parties. In the case of the Burgundians, moreover, the total partition of the cultivated land, in opposition to the communio in the woods, clearly follows from L. Burg. Tit. 13. (Canc. iv. 17.) and from the division of the bondmen, which was certainly done, with the view of providing them with people to cultivate their newly acquired lands. See below, n. 16.

(10) L. Burg. T. 54. §. 1. (Canc. iv. 29.) "... duas terrarum partes ... *ex eo loco, in quo ei hospitalitas fuerat delegata.*" If the boundaries were disputed between two Roman coterminous proprietors, whose estates had been divided with Burgundians, the process was carried on entirely by the Romans, and the judgment affected the Burgundians, according as their Hospes, the Roman, had won or lost the suit L. Burg. T. 55. §. 1. (ib. 30.)

asserts, that the Burgundians partitioned the domains of the nobility only, or great landed proprietors of Gaul. (10 a) The Roman estates were in all likelihood of considerable size; and the excess of their number above that of the free Burgundians, would show the quantity of land still remaining undivided. The Roman is sometimes styled the Hospes of the Burgundian; and, at other times, the reverse. (11) The share which the Burgundian acquired by this division, is called Sors; and the right to it, Hospitalitas. (12) Two other rules were also observed. Every Burgundian, by receiving land from the king, was excluded from depriving his Roman Hospes of the Sors. (13) And, while upon the sale of every Sors, the Roman Hospes was entitled to the first offer, no Burgundian could sell his Sors, unless he were the proprietor of other lands. (14)

(10 a) Marius in Chron. ad A. C. 456, in Bouquet, T. 2. p. 13.;—"Eo anno Burgundiones partem Galliæ occupaverunt, terrasque cum Galliis (leg. *Gallicis*) Senatoribus diviserunt."

(11) The term Hospes is applied to the Roman, in—L. Burg. T. 13—54. § 1.—56. §. 1. 2.—84. §. 2. 3. (Canc. iv. 17. 29. 30. 35.) and to the Burgundian, in—T. 13.—55. §. 1.—(ib. 17. 29.)

(12) Sors. in L. Burg. T. 14. §. 5.—84. §. 1. (ib 18. 35.)—Hospitalitas. in L. Burg. T. 54. §. 1.—55. §. 1. (ib. 29. 30.)

(13) L. Burg. T. 54. §. 1. (ib. 29.

(14) L. Burg. T. 84. (ib. 35.)

CHAP. V. §. I.

The Count superseded the Præses; while the City Decurions were continued.

The laws are of little use in explaining the constitution; and, no deeds of this period of the Burgundian Empire have been preserved. In the preface to the laws, Roman and Burgundian Comites are mentioned, and, 32 Comites have subscribed it; which shows, that the Præsides, etc. had been generally superseded, by the introduction of the German office of Count, even among the Romans. The laws present no traces of the municipal establishments; and, their existence rests merely on the general reasons already given, and on the authority of St Avitus, Archbishop of Vienne, † A. C. 525; who, in relating an event, which occurred in the time of his predecessor, remarks—that the Curia in Vienne was then composed of many noble persons. (15)

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(15) S. Aviti homilia de rogatione, p. 152. opp. Paris, 1643, 8vo. "Putabatur a quibusdam Viennensis senatus, cujus tunc numerosis illustribus curia florebat" rel. Senatus here signifies the nobility, and; their numerous members composed, at that time, the—Curia, Ordo. See above p. 60. n. 123.

SECTION II.

UNDER THE WEST GOTHS.

The West Goths likewise took two-thirds of the land from the Romans.

THE West Gothic laws are neither so numerous, nor instructive as those of the Burgundians, concerning the division of the land; owing, perhaps, to the comparative lateness of their promulgation, and to the circumstance of their having been compiled, at a time, when the first partition had lost all interest, by subsequent alienations and successions. Still, both nations deprived the Romans of two-thirds of their land; and, took not merely, a tribute of a part of the produce, but enforced a true partition of the land itself. (16) Both the Gothic and Roman allotment was called Sors. (17)

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(16) L. Visigoth. Lib. 10. T. 1. L. 8. 9. 16. (Canc. iv. 175. 176.) That there was a real division of the land, and not a Communio pro indiviso, is, least of all, to be doubted, from these very passages. See above, n. (9 a.)

(17) L. Visigoth. Lib. 10. T. 1. L. 14. & T. 2. L. 1. (Canc. iv. 176. 177.) Concerning the division of the land among the West Goths, there is a remarkable passage in the Eucharisticum of Paullinus Pretrocorius, from the second half of the fifth century, verse 501. 502. (Benedicti Paulini Petrocorii de vita B. Martini libri sex etc. p. 168, ed. Daum.

CHAP. V. §. 2.

The Judicial System of the West Gothic Romans is explained, in the Breviarium.

Our information, regarding the judicial establishments of this people, is fortunately not so scanty; for, in A. C. 506, or about a hundred years after the foundation of the West Gothic kingdom, (18) the Roman Law of the natives was collected into a sort of code—the Breviarium, which principally consists either of genuine passages of the Roman Law itself, or of a specially compiled interpretation. No great importance can be attached to the quoted passages of the Roman Law, in a question affecting its true condition at the time of the preparation of the Breviarium. When copying the sources, it was almost unavoidable to extract phrases, and even whole doctrines, referring to antiquated parts of the old system. Indeed, the Interpretation having been intended to adjust this very incongruity, is entitled to the highest credit, as fully illustrative of the condition of the Roman Law

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Lips. 1681, 8vo.) He mentions, that his sons had been induced to leave him,—" Libertatis amore, Quam sibi majorem contingere posse putabant, Burdigalae, *Gothico quanquam consorte colono.*"

(18) The Breviarium itself shall afterwards form a separate subject of discussion, when treating of the history of the Roman Law among the West Goths. See below, Chap. viii. §. i. Paulus is quoted from Schulting, and the Theodosian Code from Ritter's edition, as being the best known, although it does not refer to the Breviarium exclusively.

among the West Goths; and, particularly, when it varies from the text in meaning or phraseology: since, in these instances, there is no room for suspecting a merely literal transcript of the original. This remark applies, with greatest force, to the illustrations of the public system. Comments on the private law, to be accurate, required a more complete knowledge of technical language, than could be found at that period; and therefore many apparent peculiarities of the Interpretation may have proceeded from the ignorance of the author, and cannot be considered, as proof of the then prevailing doctrines. Quite the reverse would happen with the public law. None will suppose, that establishments and institutions, existing before the whole people, and which all might view in active operation, should be either carelessly enumerated, or inaccurately described. It has been too often the practice to consider, and unceremoniously to treat, every departure of the interpretation from the text, as proceeding from ignorance or stupidity; but, this view is at variance with the sound principles of criticism, and has plainly originated, in that partial and exclusive esteem for the old and pure Roman law, which regards every subsequent period of its progress, as undeserving of notice, and unworthy of particular inquiry. The accounts of the judicial esta-

CHAP. V. §. 2.

blishments, afforded by this interpretation, perfectly agree, with what we have already shown to be probable, upon general reasoning. The Roman Præses entirely disappears, while the municipal communities, with their particular jurisdictions, and the Decurions, with their judicial powers, are not only preserved entire, but are even more independent and powerful than under the Emperors. The greatest difficulty occurs, concerning the expression Judex; which, in the Theodosian code, uniformly denotes the Governor of the Province. In the interpretation, on the contrary, when the Judex is referred to a province, he is the Gothic Count; (19) and when in connexion with a city, the Duumvir or Defensor. (20) Where both these explanatory additions are wanting, it is impossible to decide, with certainty, the meaning of the term. Such being the true value and importance of the interpretation, we may now examine its principal statements, regarding the Judicial System.

The municipal jurisdiction of the Defensor was higher, than under the Emperors.

The general doctrines, concerning the election and duties of the Defensors, are illus-

(19) Int. Cod. Th. I. 12. 3. "Omnes Judices . . . in *provinciam* sibi commissam . . ." and afterwards, "postquam fuerit Judex ille remotus . . . sub alio Judice de *provincia* non discedat," which does not apply to a city-magistrate.

(20) Int. Paul. I. 7. §. 2. "Hoc enim, quod per Praetotem antea fiebat, modo *per Judices civitatum* agendum est." See below, n. 22.

trated both in the text of the Theodosian code, and in the new Gothic interpretation. (21) The Rector of the Province is exempted, by the text, from bestowing his attention on petty delinquencies; and, while this duty is left unappropriated, the interpretation expressly assigns it to the Defensor. (22) Civil suits may be conducted, according to the text, either before the Rector, or in any other Court of Record. The Gesta being competent, before the Defensor, his name is here almost irresistibly suggested; and the interpretation removes all doubts on the subject, by declaring his right. (23) Paulus mentions in what cases the Praetor grants restitution: and the interpretation adds, that the integri restitutio, and every suit formerly competent in the Praetor's court, shall be conducted before the city Judices. (24) This is an undeniable proof, that the municipal jurisdiction was now more ample than under the Emperors, and less limited by the Gothic Count, than in former times by the Roman Rector. The text forbids any Decurion to become Curator, Quinquennal, unless he had

(21) Cod. Th. I. 11.

(22) Int. C. Th. II. 1. 8. ". . ad mediocres Judices . . id est, aut *defensores* aut assertores pacis . . ' The pacis assertor occurs also in the West Gothic Laws. See above, p. 258. n. 147.

(23) Int. C. Th. II. 4. 2.

(24) See above, n. 20.

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previously discharged all the inferior civic offices. The interpretation repeats this prohibition; and applies it equally to the appointments of Defensor and Curator. (25) The Defensorship, contrary to its original character, had now therefore become a magistracy, capable of being filled by members of the Curia. The rule of the Code that the Gesta must be completed before a Magistrate, three Decurions, and the Exceptor, is adopted in the Breviarium, with the simple remark,—that it required no explanation. (26)

The appellate rights of the West Gothic Romans were preserved.

The question, whether the Romans lost their rights of appeal, in the new German kingdoms, admits of an easy solution among the West Goths; because, many passages, sanctioning these privileges, are found in the Breviarium. (27) Although the superior appellate jurisdiction is not named, there can be no doubt that it was formed by the Count,

(25) See above, p. 45. n. 73. and p. 70. n. 138. Int. C. Th. xii. 1. 20. "... nullum Curialem .. aut Curatoris, aut *Defensoris* officium debere suscipere . ."

(26) See above, p. 94. n. 200. Int. C. Th. XII. 1. 151. "Haec lex interpretatione non indiget."

(27) See above, p. 275. infr. Int. C. Th. II. 1. 6. "... nisi forsitan contra sententiam ... crediderit appellandum." Int. C. Th. XI. 36. 1. "In civilibus causis, vel levioribus criminibus ... appellationi constituta legibus dilatio praestanda est." This last ordinance is not contained, in the Text.

who, in so many other points, resembled the Roman Rector.

The judicial functions of the Curiæ and Decurions were unimpaired.

Other passages concern the Curia, the Decurions, or the citizens generally. The doctrines regarding the Decurions, are, for the most part, adopted in the Breviarium, although in a very curtailed form. (28) To a passage of the text, which mentions Adoption transitorily, the interpretation adds, by way of comment, that this was—the being received as a child, in presence of the Curia; and, on another occasion, directly mentions the civil jurisdiction of the Curia, although the subject is omitted in the text:—" ex quo Tutor sive Curator minoris aut per judicem, aut per Curiam intulerit, seu exceperit actionem." etc. Judex here signifies, as generally, the West Gothic Count. (29) In the same manner, the West Gothic Gaius says, that Emancipation, which formerly took place before the Præses, was now performed in the Curia. (30) The text defines the manner of appointing guardians at Constantinople,—by the City Prefects, ten

(28) Cod. Theod. XII. 1.

(29) Int. C. Th. V. 1. 2. " adoptivum, id est gestis *ante Curiam* adfiliatum."—Int. C. Th. ii. 4. 1.

(30) " Quae tamen emancipatio solebat ante Praesidem fieri, modo *ante Curiam* facienda est." Gajus I. 6. fin. [Schulting. n. 44. and Goeschen. Gaji Instit. Berol. 1824. Comm. i. §. 134. fin. n. 69.]

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senators, and the Prætor intrusted with the affairs of wards. Instead of these, the Judex, and the leading citizens, are inserted in the Interpretation. (31) The text mentions the necessity of a decree, when the property of a minor is alienated; and, the interpretation adds, that this decree shall be obtained from the Judex, or the Curia. (32) The text orders testaments in Constantinople to be opened before the same authorities,—the officium Censuale, with which they had been deposited; and, the interpretation attributes the like powers to the municipal Curia. (33) Donations, according to the text, must be protocoled either before the Judex, i. e. the Governor of the Province, or before the municipal Magistratus. Instead of the last, the interpretation inserts the Curia. (34)

(31) Int. C. Th. III. 17. 3. "primi patriae cum Judice."

(32) Int. C. Th. III. 1. 3. "auctoritate Judicis aut consensu Curiae muniatur." If, by the term Judex, be understood the Count, the applicant had the choice, between him and the Curia. This explanation will be confirmed, by the analogy of the passage in n. 34.

(33) Int. C. Th. IV. 4. 4. "Testamenta omnia, vel reliquas scripturas, apud Censuales in urbe Roma voluit publicari; hoc est, ut in reliquis regionibus *apud Curiae viros* testamenta, vel quaecunque scripturae actis firmari solent, gestorum allegatione muniantur.

(34) Cod. Th. VIII. 12. 1. fin. "apud Judicem vel *Magistratus*." Interpr. l. c. "aut apud Judicem, aut apud *curiam*." See above, n. 32.

There is not indeed produced, by this alteration, a total change in the meaning of the passage; although it is plain, from this expression and others previously used, that the subject itself had been considered in a very different point of view. The highest municipal power, and particularly jurisdiction, had been at first regarded, in the old Roman manner, as the personal rights of the magistrate; while in the interpretation, they are attributed rather to the whole Curia collectively, than to the Defensors individually; and what Paulus, in the text, applies to the album of the Prætor, is, in the Interpretation, referred to the album of the Curia, and not to that of the municipal magistrate. (35) In the time of the Emperors, the Honorati, i. e. those who had formerly filled the higher offices, enjoyed an honourable

(35) Paulus I. 13. A. §. 3. "Is, qui album raserit, corruperit ... extra ordinem punietur. Interpr. l. c. In eum, qui album curiae raserit ... capitaliter non expectata ordinis sententia vindicatur." These last words, appear to confirm the jurisdiction of the city Ordo. They are, however, worthless as historical proof, and must be considered only, as a gross misapprehension of the old technical phraseology of Paulus in the text. This opinion is further confirmed, by the employment of the same terms—non expectata ordinis sententia, in other passages, to interpret the old—extra ordinem. Interpr. Pauli I. 5. §. 2.—I. 15. §. 2.

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place near the Rector of the Province, when he sat in judgment: excepting, when their own processes were in dependence. The Interpretation applies this privilege to the Decurions, (36) which is, in two respects, important; because—it shows them to have been held in high estimation; and,—it most distinctly implies, not merely an honourable prerogative, but a direct right of participating in the jurisdiction of the municipal Judex, i. e. of the Duumvir or Defensor. (36 a) Farther, the text of the Code ordains, that five senators shall be chosen by lot, for the trial of any criminal accusation, against a Roman senator. The Interpretation makes this trial by the peers general, and requires five of the principal men, of the same rank with the accused, whether Decurion or Plebeian. (37)

(36) Cod. Th. I. 8. un. "Honorati, qui lites habere noscuntur, his horis, quibus causarum merita vel facta panduntur, residendi cum Judice non habeant facultatem." Interpr. l. c. "Honorati provinciarum (id est, ex Curiae corpore) si et ipsi in lite sunt constituti . . . cum Judice non resideant." Concerning the character of the Honorati, see above, p. 65. n. 128.

(36 a) See above, p. 89.

(37) Int. C. Th. II. 1. 12. "Cum pro objecto crimine aliquis audiendus est, quinque nobilissimi viri judices de reliquis sibi similibus missis sortibus eligantur." We may here trace the influence of the Germanic Judicators.

Finally, the Text ordains that a Domesticus, or Cancellarius, shall be chosen for every Judex, by the principal officers of his Chancery. The Interpretation retains the ordinance; but, inserts the whole citizens, in place of the Primatum officii. (38)

The West Gothic Kings attempted to prohibit the use of the Roman Law.

In later times, the West Gothic kings formed the plan of amalgamating completely the Romans with the Goths, and for that purpose, interdicted, in the West Gothic Code, the use of the Roman Law. But even this ordinance was not sufficient to remove at once all the peculiar and distinctive features of the old judicial system; for, in that very collection, among the many dignitaries, to whom the general term Judex is applied, the Defensor still occurs! (39) It cannot, therefore, appear remarkable, that Isidore, who lived sometime previous to the attempted union of the Goths and Romans, should have included the Defensors, among the existing authorities. (40)

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(38) Cod. Th. I. 12. 3. "... periculo enim Primatum Officii Cancellarios ... electos Judicibus applicari jubemus" ... Interpr. l. c. "nisi qui ei publicè fuerit *civium electione* deputatus." The Judex here must be the Count, (n. 19.) although the practical operation of the ordinance is indeed somewhat difficult to be conceived.

(39) L. Visigoth. Lib. 2. T. 1. L. 26. (Canc. iv. 73.) See above, p. 258. n. 147.

(40) Isidori origines, Lib. 9. C. 4. med. "... defensores dicti, eo quod sibi plebem commissam contra insolentiam improborum defendant. At contra *nunc* quidam eversores non *defensores existunt.*"

CHAP. V. §. 3.

SECTION III.

UNDER THE FRANKS.

The Romans probably retained their lands under the Franks.

In the Frank empire, so far as historical accounts reach, there never was a uniform mode of dividing the land; and we are thus left without any direct information, on that subject. From a passage in the Salic law, however, it seems to follow, that the old inhabitants were allowed to retain their landed property, and that the Roman system of taxation was also preserved. The composition for slaying a Roman is rated, according to the three following ranks: Convivae Regis,—Possessores,—Tributarii. The first refers to a peculiar station in the Frank-Court; while, the second and third are decidedly remains of the Roman provincial constitution. The Possessores are the landed proprietors, whose estates were burdened with the payment of a land-tax; and, the Tributarii are the other inhabitants of the provinces, whose contributions to the general government were levied, in the shape of a poll-tax. (40 a) On the other hand, there are the most distinct traces of the old municipal constitutions having ex-

(40 a) L. Salica emend. Tit. 43. art. 6—8. (Canc. ii. 143.) See above, p. 56. and Savigny Abhandlung über die Römische Steuerverfassung. S. 54.

isted in uninterrupted continuance, under the Frank-conquerors. On this subject, however, our examination of the special proof may be allowed to precede that of the general evidence.

The Municipal Constitutions of the Roman cities were continued.

In a deed, A. C. 543, by which two spouses, Ansemund and Ansleubana, found a cloister in Vienne, it is stated, that the Curia of the city had sanctioned the endowment. (41) In A. C. 573, at Lyons, the Testament of St Nicetius was opened and published, according to the ordinance in the Roman Law, by the municipal magistracy charged with that department of public business. (42) Likewise,

(41) "Non habetur incognitum, qualiter fratres (leg. sciente) Senatu nobilis Viennensis (leg. nobili Viennensi) res nostras Deo tibique tradidimus." The deed may be found in many places, and among others in Baluz. capit. ii. 1438; but most accurately in Brequigny,—diplom. N. 24. p. 49. (proleg. p. CCXLV.); who has both fixed its date, and proposed the above amendments on the Text. The testament of Ephibius, A. C. 696, also from Vienne, mentions—the senate,—a great number of individual senators, and even—a Quaestor Simplicius. Dachery Spicil. T. 3. p. 318. or T. 12. p. 103. ed. Paris. 1675. 4to. Brequigny diplom. N. 237. p. 346, (proleg. p. CXXIX). But, the deed has been shewn, by Brequigny, to be spurious.

(42) Gregor. Turon. vitae Patrum C. 8. §. 5. (p. 1187. E. Oper. Omn. Paris 1699. fol.) "Post dies autem quos lex Romana sancivit, ut defuncti cujuspiam voluntas publice relegatur, hujus Antistitis testamentum in foro delatum, turbis circumstantibus, a judice reseratum recitatumque est." See Paulus Lib. 4. Tit. 6. §. 2. 3.—Concerning A. C. 573. the date of the testator's death, see Gallia. christ. T. 4. p. 35. supr.

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in lawsuits at Tours, during the sixth century, the municipal jurisdiction was distinctly acknowledged. (43). The Senators and Senatorian families, so frequently noticed by Gregory of Tours, as occuring in many districts of the Burgundian and Frank Empires, (44) are at least indirectly illustrative of our subject; for, we know the connexion, which this Roman nobility had with the municipal constitutions; and, if the latter had entirely disappeared, no trace could have remained of the former. Among the proofs also of the continuance of the municipal constitutions under the Franks, must be reckoned the Testaments of Bertram, A. C. 615, and of Hadoindus, A. C. 642. Both appoint the future opening to take place, before the Curia of Cenomanum. (44 a). Two testaments of the Abbot Widrad of Flavigny are preserved. The earliest of these, A. C. 721,

(43) Gregor. Turon. VII. 47. (p. 370. D.) "Dehinc cum *in judicio civium* convenissent." The Judex, mentioned afterwards several times, is undoubtedly the municipal magistrate.—Id. V. 49. (of the Comes Leudastes at Tours, A. C. 580). "Jam si in judicio *cum senioribus* vel laicis vel clericis resedisset" rel. (p. 261. E.)

(44) Gregor. Turon. II. 33. fin.—III. 9. princ. 15. princ. —X. 31. §. 2. 6. 7. 12. 14. 18. See above, p. 60. n. 123.

(44 a) See below, Chap. IX. n. 98. In the eleventh century also Petrus, Except. Leg. Rom. I. 37. (See Appendix) mentions the Curia, where his authority, Julian 108. C. 7. 9., speaks of the Fiscus.

was prepared in Semur. (45) The future solemn opening of it, according to the old established form, is ordered to take place, before the Curia; (46) which could not have happened, if the Curia had not existed at its date. The Defensor Gerefredus is the first of the three subscribing witnesses. From the small number of these, even insufficient for a codicil, and from the general statement of many other persons having been present, we may with certainty conclude, that this was not a private, but a public testament, which had received its validity from the first by the interposition of the Curia. The municipal constitution, however, thus proved to be in full continuance, is so much the more remarkable, since Semur was a mere castrum, and not one of the principal cities of Gaul. The testament of the Bishop Tello of Chur, or Coire in Rhetia, A. C. 766, is subscribed by twelve witnesses. Of that number five are Decurions, and among these, one is from Chur, and three from other small places. (47)

(45) "Actum Sinemuro castro;" i. e. 'Semur en Auxois,' quite near Flavigny. The Testament is given in Mabillon act. Sanct. ord. S. Bened. Secul. Tert. P. I. p. 635. infr. Venet. 1734. and in Brequigny diplom. N. 305, cf. proleg. p. CL. CCXLII. We shall afterwards allude to its singular agreement with the Formulæ. See below, p. 302, n. 58.

(46) "Ut . . . gestis reipublicæ municipalibus titulis . . . muniatur . ." (Mabillon. l. c. p. 638. infr.)

(47) "† Signum Præsentis curialis testis. † Signum

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This is particularly proved, by four Angers deeds, A. C. 804.

The latest proof of a known date is however the most convincing, in favour of the continuance of the judicial system of the Roman cities. Harvich of Angers, A. C. 804, donated several estates to the Abbacy of Prüm near Treves; and, concerning this donation, there has been preserved a progress of four deeds,—all prepared at Angers in Anjou. (48) The first is the deed of donation itself, and contains an announcement regarding the protocoling before the Curia. (49) On the same day, a separate deed follows, concerning the tradition of the land, by constitutum possessorium; and, in it, is quoted the passage of the Roman law, regarding tradition in donations. (50) The third, also of the same date, is a mandate to Aganbertus, the donor's brother, to

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Lobucionis de Amede curialis testis. † Signum Constanti de Senegaune curialis testis .... † Signum Claudii de Curia curialis testis. Signum Urseceni de Scanavico curialis testis." The Testator often speaks of his Father, "patris mei Victoris vel illustris *Praesidis*." The original is preserved among the Archives at Einsiedeln, (l'Hermitage,) and has been printed in Mabillon annales ord. S. Bened. T. 2. p. 710. supr.

(48) The four deeds are given in Martene ampliss. collectio T. 1. p. 54. 56. 57. 58. The second and fourth only are contained in Hontheim hist. Trevir. diplom. p. 154. 155.

(49) Martene, p. 56. A. "Praesente vero donatione .... Gestis municipalibus alegarie curavi et omnino decrevi."

(50) Martene, p. 56. E. "Cum in *libris Theodosiani et Hermogeniani seu Papiani*, per quem lex continet, scriptum est quod donatione traditio subsequatur. Igitur ego ...

attend to the protocoling; and, last of all, comes the deed on the protocoling itself, which agrees exactly, both with the precedents given in the Formulæ, and with the Ravennese Protocols in Marini. Here also, the whole business is conducted, as dialogue between the Defensor and Attorney; and a copy of the Protocol, attested by the Decurions, is granted in conclusion. Among the twelve subscribing witnesses, the Comes Nononus is the first, and the Curator Risclenus the second; then follow the Defensor Wifredus, who is also styled

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quantum in ipsa donatione continet ei ad die praesente trado, dulgo (sic,) atque transcribo" (p. 57. B.) . . The words, at the beginning, are an awkward description of the Breviarium, which indeed contains extracts, from all these Collections. The exclusive application to the Code of the West Gothic Romans, is incontestably proved, by the verbal agreement of Interpr. C. Th. VIII. 12. 1. fin. ". . et hanc ipsam donationem . . . traditio subsequatur" . . With this excellent remark, Biener de orig. leg. Germ. P. 1. p. 291. 292. has satisfactorily answered those, who strive to find, in the phraseology of this instrument, a reference both to the Theodosian Code, and to the Responsa Papiani; a connection, in itself extremely improbable, and totally unsupported by any verbatim coincidence in the Papian. Considering the obvious purport, and contents of the two first deeds, it is quite astonishing how Martene (p. 55. not. C.) and Hontheim could view them as mere duplicates. Of these it is also said, that one remained in the Curia, and the other was sent to Prüm. The Curia, however, retained all the original protocols, and copies only were afterwards granted.

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Vicedomus, and two Centenarii. Leodegarius, the clerk of court, is called Amanuensis, and not Exceptor. (51) The double title of the Defensor is here remarkable, as also the appearance of the Frank magistrates—the Centenarii, in the Curia. This last circumstance, however, does not necessarily prove, that the amalgamation with the Roman civic communities had already commenced. These Frank magistrates are present merely in the character of strangers; and, notwithstanding the attendance of the Count, who, as the supreme functionary, is named first, the Defensor alone really arranges and conducts the whole proceeding. A wish might arise to bring the printed chronicle of the consuls of Angers (52) into connexion with this highly interesting relic of the Roman constitution in that city; but this chronicle uses the word

(51) Martene p. 58. C. "Adstante vir laudabile Wifredo (leg. Wifredo) *defensore*, vel cuncta *curia* Andeg. civitate adstantium Agambertus dixit"; ... and towards the conclusion (p. 59. A)—"*Defensor* dixit: gesta cum fuerit scripta, a nobis *a curialibus* subscripta, tibi edita ex more tradatur. Edita vero accepit. Signum † Nonono comite. Signum † Riscle no curatore. Signum † Wifredo vicedomo. . . . Sig. † Letbaudus centenario . . . Signum † Stabulo centenario." The other seven witnesses bear no titles, and are the Decurions, mentioned in the body of the instrument.

(52) Gesta Consulum Andegavensium, in an unbroken series from the Carlovingian times. Dachery Spicil. T. 3. p. 234, seq. or T. 10. p. 399—510. Ed. Paris. 1671. 4to.

" Consul," to signify the Count, and not the civic Magistrate. In it, the expressions Consul and Comes are frequently employed as synonymous;—a phraseology not uncommon with authors of the middle ages. (53)

By the different collections of Forms.

The different collections of Formulæ contain many proofs of the preservation of the Roman judicial institutions. In these are found precedents for protocoling before the Municipal Curia, in different matters; particularly,—in testaments, and donations. They give, at the same time, a sketch of the procedure, which is quite old Roman, by question and answer, returning of thanks at the end, and begging a copy of the protocol; as in the above case, from Angers. Such a protocoling of a donation, in that city, about A. C. 578, at the instance of an attorney, is contained in the forms of Mabillon. (54) As members of the Curia, are mentioned—first, the Defensor, Curator and Magister Militum; —afterwards, the Defensor, and Principalis, all probably by way of example, in order that

(53) Ducange v. Consul. ii. 1007.

(54) Form. Mabillonii C. 1. (Canc. iii. 469.) Among the important collections of formulæ, we must here class the small one of Auvergne, edited by Baluze, and contained in Canc. iii. 264. 265. There, the Defensor, Curia, and Gesta Municipalia, are repeatedly mentioned. Concerning this collection, see below, chap. IX. n. 116, and text.

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the notary might insert them, according to circumstances. Diaconus, the clerk of the Curia, is styled Amanuensis. Marculf, about A. C. 660, in the district around Paris, gives likewise precedents for protocoling donations and testaments. (55) The latter are also contained in the appendix to his collection. (56) In both, the Defensor appears at the head of the Decurions. Among the formulæ of Sirmond, a donation is protocoled at Tours, in presence of the Defensor, Curia and Amanuensis. The Decurions are sometimes called Curia, or Ordo, and at other times Principals, as in the Theodosian Code. (57) In a testament, among the formulæ of Baluze, the future opening, before the Curia, is prescribed, according to the ordinance of the Roman law. (58) Finally, the formulæ of

(55) Marculf. Lib. 2. C. 37. 38. (Canc. ii. 241.)

(56) Appendix Marculfi. C. 53. 54. 55. (Can. ii. 267.) There is a particular mode of expression in C. 53. princ. "illo defensore *et illo professore*, vel curia publica ipsius civitatis." The same is also to be found verbatim in C. 54. princ.; but afterwards the Defensor and Curia only are mentioned; and professore has probably been inserted by the copier.

(57) Form. Sirmondi. C. 2. 3. (Canc. iii. 435). See above, p. 94. n. 200.

(58) Form. Baluzii C. 28. princ. (Canc. iii. 457). It is worthy of observation, that this formula entirely agrees with the above quoted testament of Widrad; with this exception,—that, in the last, the place and names of the persons are filled up, and the subscriptions added. See above, p. 297. n. 45.

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Lindenbrog present us with an adoption, before the Defensor and the Curia. (59) From all these illustrations, it is plain that, among the Franks, the judicial establishments of the cities of Gaul were preserved, in the same condition, as before the overturn of the Western empire; for, it has been already shown (59 a) that, even in these early times, Defensors, and not proper Magistrates, presided over their municipal affairs.

By old tradition, in many of the cities of France.

In many of the cities of France, there was a belief, that the Roman judicial institutions had continued, without interruption, until recent times. On this circumstance, the citizens of Rheims, in the twelfth century, founded a claim; and, when the municipal tribunals were abolished, by the Edict of Moulins, in the 16th century, Rheims was exempted from its operation, (60) on account of the great

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(59) Form. Lindenbrogii C. 59. princ. (Canc. iii. 488).

(59 a) See above, p. 61. 88.

(60) Joannis Sarisberiensis († 1180) epist. 214 domino Pictaviensi (Bibl. max. Patrum Lugd. T. 23. p. 495, C.) "... in urbe Remensi orta seditio ... Et primo quidem oi (archiep.) omnem humilitatem exhibuerant parati duo millia librarum, sicut multi testantur, conferre in ærarium ejus, dum modo eos jure tractaret et *legibus* vivere pateretur, *quibus civitas continue usa est a tempore S. Remigii Francorum apostoli.*" [The Edict of Moulins was promulgated by Charles IX., at the suggestion of the Chancelior de l'Hôpital, in A. C. 1566.]

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antiquity of its privileges (61). The same opinion prevailed in the cities of Toulouse, Lyons, Boulogne, Angoulême, etc.; although these were not equally successful with Rheims in obtaining, by that argument, a confirmation of their old rights, (62).

And, by the occurrence of Roman Scabini, in the Courts.

In what sense Roman Scabini, occupying the place of Judicators in the Courts, can be considered as proof of the continuance of the corporate institutions, has been already shown, (62 a) Several examples of this kind are found in the empire of the Franks. In an Aix-la-Chapelle deed of Charlemagne, A. C. 797, mention is made of a dispute between the King and the Abbot of Prüm, about some lands; and these are adjudged, according to the Roman law, and by Roman Scabini, not to

(61) Dubos. etabl. de la mon. Franc. VI. 11. T. 2. p. 533. 534., quotes Bergier, Discours sur l'antiquité de l'echevinage de la ville de Reims, etc. "La Cour, dit Bergier, ordonna par son Arrêt du 25. Mai 1568, que les dits Echevins jouiroient de leur Justice et de leur jurisdiction non obstant l'edit de Moulins, ainsi qu'ils avoient fait ci-devant, parce qu'il fut reconnu qu'il ne se devoit étendre sur les villes de cette qualité, *qui en jouissoient avant que la France fut en Royaume.*" Bergier adds, that the college of justice (echevinage) of this city is merely the Curia, which existed before the Roman Conquest, and continued unchanged under the Romans and Franks; although, the latter gave it a new name.

(62) Dubos. l. c. p. 535.

(62 a) See above, p. 277. med.

belong to the Abbot. (63) In Southern France, Roman and Salic Scabini are mentioned in a Placitum, A. C. 844; (64) and Gothic, Roman, Salic Scabini and Rachinburgers occur, A. C. 918, at Ausonne. (65) In like manner, at Narbonne, A. C. 933, there were Gothic, Roman, and Salic Judices; (66) and, although the Judges at Arles, A. C. 968, in a Placitum of Count William of Provence, were vassals, their Roman and Salic origin is noticed. (67)

A historical fact, which proves that all the most important matters were brought direct-

The Municipal Tribunals were under the Counts.

(63) "Qui in conspectu nostro ac plurimorum procerumque nostrorum stans in judicio, secundum quod lex Romana edocet, et sui Scabinii ei judicaverunt, prædictas villas . . . reddidit." Martene coll. ampliss. T. 1. p. 52. A. Hontheim hist. Trevir. dipl. T. 1. p. 144. See above, p. 151. 210. n. 114.

(64) Placitum in Cadarosco villa, "ante Rothbertum vicarium . . . et tam Scavinis, tam Romanis quam Salicis . . . vel quampluribus aliis qui cum ipsis aderant." Gallia Christ. T. 1. Instr. p. 107, N. 4. B.

(65) See above, p. 201.

(66) "Judices . . tam Gotos quam Romanos vel etiam Salicos." Vaissette T. 2. preuves, p. 69. N. 56. princ.—Gallia Christ. T. 6. Instr. p. 423.

(67) ". . . ante domino Willelmo inlustrissimo comite, *et ante vassos dominicos*, tam Romanos, quam Salicos, una cum plurimarum personarum diversis legibus viventibus." Martene coll. ampliss. T. 1. p. 322. C.

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ly before the Count, affords also a strong analogy, in favour of the opinion of the municipal tribunals being subject to his supreme control. (67 a) Under the Carlovingians, it happened, on different occasions, that a number of West Gothic subjects passed the frontiers, and sought protection from the Franks. The King was accustomed to grant them charters; and, of these, the Capitularies contain many examples. Such a Præceptum confirmationis, A. C. 844, frees them from the jurisdiction of the Count, except in the three crimes of Murder, Rape and Fire-raising. All other law questions, whether they concerned those to whom this charter was given, or their dependants and bondmen, might be decided by their own law, and before their own tribunals. (68)

The Counts superseded the Præses.

While the continuance of the municipal magistrates among the Franks has thus been established, the higher functionaries of the Roman Judicial System were not so fortunate. The Roman Governors of provinces seem to have been supplanted by the Frank Counts. An exception is found in Rhetia, which passed from the East-Goths to the Franks. In

(67 a) See above, p. 274.

(68) Baluz. capit. ii. 25—30. " . . liceat ipsis, secundum eorum legem, de aliis hominibus judicia terminare; et præterhæc tria, et de eorum hominibus secundum propriam legem omnia mutuo definire." (§. 3. p. 27. med.)

it, the Præses existed during several centuries. (69) Patricii likewise occur, for a long period, as Governors in the Burgundian provinces. (70) According to a statement in the Capitularies, the Præsides might be regarded as very common magistrates, presiding over single cities. Nevertheless, the Collection of Benedictus Levita, in which the authority occurs, is not entitled to the smallest credit. Indeed, this very passage, although only borrowed from Julian, has lost, by the blunders of the transcribers, nearly all resemblance to its original. (71) Another notice of the Capitularies, regarding Roman

(69) Müller Schweizergesch, B. 1. C. 9. 10. S. 128. 161. 183.—185. See above, p. 298. n. 47.

(70) Gregor. Turon, Lib. 6. C. 11. princ. Dynamius rector. —Lib. 8. C. 43. princ. Nicetius rector. Compare Ruinart on these passages, and Müller, l. c. B. 1. C. 9. S. 128. 141.

(71) Capit. Lib. 5. C. 387. (Canc. iii. 261.) "In civitatibus, in quibus præsides *præsunt*, ipsi audiant causas, seu et defensores. Qui autem episcopos vel sacerdotes aut clericos judicare sibi maluerint, hoc quoque fieri *non permittimus*." Julian. Const. 69. C. 7. "In civitatibus, in quibus præsides *præsto non sunt*, adeant litigatores defensorem civitatis, et ille audiat causas. Si autem episcopum judicare sibi maluerint, hoc quoque fieri *jubemus*." That the alterations on the original were not intended, is plain, from a comparison of the conclusion—Qui autem, &c. with the contradictory passage, Lib. 6. C. 366. med. (Canc. iii. 296.) Concerning this collection of Capitularies, see below, Chap. ix. n. 48. and text.

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The condition of the Roman Cities, under the Franks, has been misunderstood by Dübos, Büat, Moreau.

Praefects, Praetores populi, and Præsides Provinciarum, is equally unworthy of belief. (72)

In conclusion, we may add a few literary notices, regarding the constitution of the cities, in the empire of the Franks. (73) The Abbé

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(72) Capit. Addit. III. C. 59. (Canc, iii. 380.)

(73) A fruitless attempt has been made to procure a copy of—Droz, essai sur l'hist. de Bourgeoisies du Roi. Besançon, 1760, 8vo. (Camus. N. 526. Ed. Paris, 1818.) The Memoire of Dupuy, in hist. de l'ac. des Inscr. T. 38. p. 196—215. ed. 1777, 4to, contains no information of any importance. [Of the 17 volumes of the Ordonnances (Camus. N. 605. p. 170.) already published, the whole, with the exception of the 10th, have prefaces varying in length and importance. Their chief value consists in their reasonings on the law and constitution of France, after the period to which our researches are confined; and, while much information is afforded regarding the later condition of the cities, many scattered notices occur, illustrative of their earlier state. The levying of taxes from the city territories,—the prud'hommes apportioning these taxes,—the royal confirmations of municipal rights derived from other sources than the Ordonnances Royaux,—the payment of the usual municipal burdens by a nobility connected with the cities,—the appearance of the city deputies as a distinct order in the national assemblies,—the attempts of the crown to increase the municipal taxation,—the consequent resistance of the citizens, and the further encroachments of royal prerogative, in abolishing the incorporated trades, and transferring the jurisdiction, belonging to magistrates chosen by the citizens, to a Prévôt sent by the King, are a few of the principal subjects, on which the Prefaces supply much valuable and curious information. Besides these general inquiries, the 11th and 12th volumes are preceded by remarks, upon the very subject, at

Dubos, whose bold and well known conjectures have been sufficiently attacked, has discussed this subject more ably than any other author; and has maintained the continuance of the municipal communities, even

present under examination. Although in the Preface to the 11th volume, Communes are said to depend entirely on a royal grant—to have originated only in the 12th century, (Brussel, de l'usage des Fiefs. T. ii. p. 902.)—to have been generally gained by revolt, and sought after as a protection against feudal and ecclesiastical oppression, the high antiquity of many of the municipal constitutions, particularly of Lyons and Rheims, is at the same time fully admitted. Vilevault and Bréquigny recapitulate, however, and modify some of their former opinions, in the preface to the 12th volume, which is a continuation of the same subject. Communes are now said to have arisen in two ways; either from new grants, or from royal confirmations of the rights of already associated citizens. The latter occur most frequently in the south of France; where, in many cases, the royal charters only renewed ancient privileges. This policy was begun by Lewis VI., for the purpose of increasing the royal authority, and diminishing that of the feudal proprietors. The consequences of this plan forced the Seigneurs to follow the example; and their grants were ultimately subjected to the royal confirmation. The two classes of cities continued the same as in former times. The 'Communes,' are the municipia, entitled to elect their own magistrates—'Maires, Consuls:' and, the Praefectures bear the name of 'Villes de simple Bourgeoisie,' possessing corporate institutions, but receiving, unlike the former class, both their laws and their supreme magistrates—'Prévôts, Juges Royaux,' from the King, or their immediate feudal superior. These communes or municipia, having each legislative power, the

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without the knowledge of the special historical proof. His general and erroneous system, regarding the foundation of the empire of the Franks in Gaul, together with traditions existing in many of the cities, seem alone to have brought him to that conclusion. (74) Dubos' doctrine has, however, been brought into discredit, by the untenable hypotheses and exaggerations of its supporters. Thus, Count Büat, maintains strongly his discovery of a very complicated and really inconceivable remnant of the old mode of governing the Roman provinces. (75) Moreau has also this peculiarity, that, regardless of the authority of history, he considers the Roman cities, as the basis of the whole constitution of the Franks, and even subjects the Franks to their dominion. This author always con-

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laws became so various as to justify the statement of Beaumanoir, A. C. 1283, in the Coutumes de Beauvoisis, p. 2. 'qu'on ne pouvoit trouver en France deux Châtellenies qui de tout usassent d'une même Coutume.' In many old cities, of which the privileges had been confirmed by the King, Roman ordinances were followed; thus, murder was punished with death, or banishment and confiscation of property, proof by duel was prohibited, &c. &c. A great number of the original charters of confirmation or erection are contained in the two volumes last mentioned.]

(74) Dubos etabliss. de la mon. Françoise, Liv. 6. Ch. 11.

(75) Les Origines, T. 2. Liv. 5. Ch. 27—34.

founds the Roman and Frank elements of the Constitution. (76)

By Mably, Lezardiere, and Montlosier.

Mably has declared decidedly, against the continuance of the cities, and for a reason, which is, at all events, entitled to a serious examination. (77) The judicial authorities of the empire are said to be enumerated in a great number of deeds and capitularies, without ever mentioning either the cities, their councils, or their magistracy. It is plain, however, that most of these laws and deeds relate principally to the Franks; and, any mention of the Romans would, therefore, have been out of place. There may also be many, although now unknown, allusions to the municipal authorities; since, undoubtedly, their old titles would, in the course of time, be changed for new. Such a case occurs in the deed already mentioned, (77 a) in which the Defensor adds to his subscription the term—Vicedomus. Another work, on the history of the constitution of the Franks, is also opposed to the continuance of the cities; (78) although, the argument is

(76) Moreau principes de morale, etc. T. 2. p. 70. 73. 115. 116.—T. 4. p. 151. 167.

(77) Mably observ. sur l'hist. de France, Liv. i. Ch. 2. not. 5. (T. i. p. 442—444 of the Kehl edition.)

(77 a) See above, p. 300.

(78) Théorie des loix politiques, etc. T. 7. Sommaire des preuves, p. 176—180.

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principally directed, against the unfounded opinions of Moreau. Mademoiselle Lezardière misunderstands the essentials of the Roman domestic policy. This authoress has not indeed overlooked the passages of the formulæ, regarding the Defensor and Decurions: but, in order to obviate the difficulty, maintains, that the Roman Law absolutely required, in many matters, the participation of the Curia. For the purpose of yielding a literal obedience to this rule, after the decline of the cities, persons are said to have been chosen, to whom the names of Defensor and Decurions were given, merely in order to afford a representation of the old Curia. Every reader must perceive how forced and improbable is this opinion. Its absurdity becomes, moreover, irresistible, when the alleged absolute ordinance of the Roman Law, regarding the interference of the Curia, is discovered to be a mere fiction. Testaments might always be made before seven witnesses, and donations might be protocoled, not merely in presence of the Curia, but also before the Rector of the province, whose place the Frank Count afterwards filled. In reality, therefore, the performance of the above circumstantial and uninteresting ceremony was altogether superfluous. Montlosier, setting out with the false hypotheses of Dubos, arrives at quite

different conclusions. Every institution is declared to be modern, and founded on usurpation, excepting the nobility, feudal systems, and villeinage. These, it is said, existed in Gaul before the time of the Romans. In conformity with the opinion of Dubos, the Roman and Frank invaders, are viewed as friends, allies, and maintainers of the whole institutions of Gaul. Among the Franks, therefore, these continued and spread, but, by no means, originated, (78 a). They were even adopted by the Romans in other countries, as well as in Gaul. The Romans depriving the Hernici of their estates, giving them to new possessors, and partitioning land among the military colonies, are all regarded as proofs of the existence of the feudal system. The same construction is put, both upon the old Patrician clientela, and upon the merely titular clientela of whole cities and districts, under the principal Romans, (78 b). The fate of the cities is said to have been the following. Among the Franks, their privileges continued, (78 c), although most of the free

(78 a) Montlosier de la monarchie Française, T. i. p. 12. 13. 340. Paris 1814. 8vo.

(78 b) l. c. p. 342. 348.

(78 c) And, while the King judged the Franks, the free Gauls were tried in capital crimes by the Count, with his Scabini and Rachinburgers. l. c. p. 19. med.

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Gauls went over to the Franks, and forsook the cities. (78 d) In consequence of this emigration, the civic communities for a while totally disappeared; and the citizens of subsequent times were mere tradesmen, i. e. villeins or bondmen—hommes tributaires. These cities had no connexion with the former; and the political rights, which they acquired, were quite new and, for the most part, extorted from the nobility. (78 e) Thus, Monlosier arrives at the conclusion, that the whole originally free Gauls, Romans and Franks were included, among the nobility; while the bondmen, i. e. both the proper villeins, and the servile dependants, formed the Tiers-etat: from which however many were raised, in the course of time, to the rank of nobility, by patent.

SECTION IV.

UNDER ODOACER.

Odoacer's soldiers took one third of the lands in Italy.

THE revolution, by which the Western Empire was totally subverted, arose from the

(78 d) l. c. p. 21. 25. 367. 388. supr. See above, p. 134. n. (83 a)

(78 e) l. c. p. 159—162.

purpose formed by the German hired soldiery, of obtaining a third of the land in Italy. Disappointed in their hopes, they overturned the long enfeebled government,—seized upon the land which they had coveted, and—raised their leader to the rank of King of Italy.

The whole Roman judicial system was continued under Odoacer.

Odoacer's sway, however, was of too short duration, A. C. 476—493, to admit of his system assuming distinct characteristics. As a whole, the old judicial institutions remained, even in their higher branches. This is certain from their subsequent continuance, under the East Goths, of whose empire we possess much more accurate information. If such was the fate of the supreme authorities, we may be still more certain of the unchanged continuance of the municipal establishments: and, fortunately, this may be proved by cotemporary deeds, which shall be afterwards noticed.

SECTION V.

UNDER THE EAST GOTHS.

The Tertia was, either the East Gothic third of the land, or the Provincial Land-Tax.

The East Gothic empire in Italy, notwithstanding its short endurance, may be classed among the most remarkable phenomena of the middle ages; and the name of the great

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Theoderic, like that of Charlemagne, has been rendered immortal, both in poetry and authentic history. In dividing the land, the East Goths were content with the third, which might have belonged to their immediate predecessors: (79)—a sufficient portion, when it is considered, that among the Heruli, as among the other tribes, the rights of division were not rigidly enforced; and the greatest part of the allothients, actually occupied, must have again become vacant, by the unfortunate result of the war, with the East Goths. (79 a) The West Goths, who took two-thirds, styled the remainders—Tertiæ: (80) while, the East Goths use that term in an opposite sense, to denote their own portions. (80a) Cassiodore, when mentioning the actual division of the land into parts, uses the term in this signification, and states, that by the wise regulations of Liberius, the Goths and Romans had been rather soothed than thrown into fresh agitations. This allotment of the thirds is

(79) Procop. de bello Gothico, Lib. i. C. 1.—See Lupi Cod. Bergom. C. 3. p. 78.

(79 a) See above, p. 281.

(80) L. Visigoth. Lib. 10. T. 1. L. 8. and L. 16. (Canc. iv. 175. 176.) "Judices . . . *tertias Romanorum* ab illis qui occupatas tenent auferant." See above, p. 283.

(80 a) [The rest of this paragraph, to the end of n. 87, was composed, by the celebrated author, expressly for this translation.]

called—Tertiarum Deputatio. (81) In a deed of sale also, dated a short time before the end of the East Gothic Empire, the lands are declared to be free from the Sors Barbarica; (82) a clause inserted, no doubt, for the purpose of relieving the purchaser from the fear of being deprived of a third, as the Gothic Sors, The estate having already suffered the usual division, and the lands exposed to sale being only the remainder, or the Roman two-thirds, the assurance is given, that they are no longer

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(81). Cassiod. Var. II. 16. fin. "Juvat nos referre, quemadmodum in *Tertiarum deputatione* Gothorum Romanorumque possessiones junxerit et animos . . . . gratia dominorum *de cespitis divisone* conjuncta est: amicitiae populis per damna crevere, et ut *parte agri* defensor acquisitus est, ut substantiae securitas integra servaretur. Necesse est enim, ut inter eos suavis crescat affectus, qui servant jugiter *terminos constitutos.*" The same author (in i. 18.) speaks, with equal plainness, of the assignment of distinct portions of the land.

(82) Marini papiri, N. 115. lin. 6. "liberas autem inlibatas portiones duorum fundorum ab omni nexu fisci deviti populi pribative et ab here alieno litibus causis controversihisque omnibus *nec non et a sorte barbari.* In note 5. p. 337, Marini leaves the term unexplained; but, says that the original reads—barbarici, or barbarica. The last is, indeed, the proper text, according to the analogy of Sortes Gothicae, in L. Visigoth, X. 2. 1, (Canc. iv. 177.) But, there is an authority in favour of barbarici, in Marini, N. 86. lin. 11. "a tempore hoc barbarici." None of these readings change the signification.

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subject to a second partition. On the other hand, Cassiodore frequently employs the expression, in a totally different and very important sense. The East Goths retained both the land and poll-taxes of the Romans. The former being levied thrice a year,—on the 1st January, 1st May, and 1st September, was called the—Trina illatio, or Tertiæ, by which term it is frequently designated in Cassiodore; and, sometimes, either with an express reference to the old Roman constitution, or to the number of the Indiction, with which, indeed, the Roman revenue was closely connected. (83) The same author states, that a city had, by special favour, received the privilege of paying the Tertiæ no longer at three terms, but, in one sum, at the end of the year. (84) In another pas-

(83) Cassiod, Var. XII. 2. med. "Possessores praecipimus admonere, ut tributa Indictionis tertiae decimae devota mente persolvant: quatenus *trinae illationes* moderamini custodito, debitam reipub. inferant functionem. (See also XI. 7. princ. 35. med.) de illa provincia *ex illatione tertia* (al tertiarum) fiscalium tributorum Solidos, quos Principi Augustorum provida deputavit Antiquitas, sine aliqua dilatione persolvat, quos noveris, tertiae decimae Indictionis rationibus imputandos."

(84) Cassiod. Var. I. 14. Et ideo praecelsa magnificentia tua, quod a Cathaliensibus inferebatur *genus Tertiarum*, faciat annis singulis in *tributaria summa* persolvi . . . Quid enim interest, quo nomine possessor inferat, dummodo sine imminutione quod debetur exsolvat? Ita et illis suspectum *Tertiarum* nomen auferimus, etc.

sage, also, the land-tax paid by the city of Trent, for its domains, is diminished in proportion to the value of an estate, which the King had resumed, and given in feudal grant to an East Gothic priest; because, the estates of the Goths paid no land-tax. (85) The Roman poll-tax is mentioned by Cassiodore, under the names of—Bina et Terna, and with a reference to the old Roman constitution. This appellation is explained, from an ordinance of the Emperor Gratian, in which the poll-tax is reduced to two fifths of its original sum: so that, in future, the numbers of two and three men alternately should not pay more than the contribution, formerly exigible from one. (86) The reasons, upon which this opinion rests, have been stated at length in another work. (87)

(85) Cassiod. Var. II. 17. Cognoscite, pro sorte quam Butiliano presbytero nostra largitate contulimus, nullam debere solvere fiscalis calculi functionem: sed in ea praestatione quanti se solidi comprehendunt, *de Tertiarum illationibus* volis noveritis esse relevandos. To this refers the passage in Marini papiri, N. 138. lin. 26, where a "Pittacium de titulis Tertiarum," relative to a sum of money, is mentioned.

(86) Cassiod. Vrn. III. 8—VII. 20. 21. 22. Also L. 10. C. de agric. (11. 47.) Cum antea per singulos viros, per binas vero mulieres, capitis norma sit censa, nunc *binis ac ternis viris*, mulieribus autem quaternis, unius pendendi capitis attributum est.

(87) See Savigny Abhandlung über die Römische Steuerverfassung. S. 59. 53.

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The Roman Public and Municipal Institutions continued under Theoderic.

The institutions of the East Gothic kingdom differ essentially from those of the other German States. The Gothic nation formed exclusively the army, and their chief became king of the country. The Roman constitution, the Senate, the Offices of State, the Household, and the Provincial governments were all preserved, and most of the situations in these various departments were generally filled by Romans. (88) That the constitution of the cities underwent no change may, therefore, be maintained, with the greatest probability. Indeed, the fact is mentioned, although vaguely, in many passages of Cassiodore. He frequently introduces Decurions, and gives precedents for the appointment of a Defensor and Curator, i. e. a Quinquennal. (89) Nothing is said of the Duumvir; not from an accidental omission, but—from the two former exclusively requiring the confirmation of the state, and—from these forms

(88) Manso Uebersicht der Staats-Aemter und Verwaltungs-Behörden unter den Ostgothen, nach den Bestallungen Cassiodors. Breslau. 1823, 8vo.—Mascov Gesch. der Teutschen, Th. 2. B. 11. §. 42. 43. and n. XIV.—Sartorius Versuch über die Regierung der Ostgothen. Hamburg, 1811. 8vo: [or, the Paris Ed. of the same year, entitled "Essai sur l'état civil, &c. des Goths."]

(89) Cassiod. VII. 11. 12. See above, p. 48. n. 84.

being intended only as precedents for obtaining such ratification. Passages of the Edict of Theoderic, concerning the municipal constitution, with Duumvirs and Quinquennals, have been already explained. (89 a) Nevertheless, the fact of the preservation of the civic institutions in purity, will be rendered most apparent by Marini's deeds—to be afterwards examined. On the subject of jurisdiction, in particular, a passage of Cassiodore is quite decisive. The lawsuits of Romans with Romans were regulated, by the rules of the old judicial system. The Comes Gothorum acted as judge between Goths, and also, without distinction of the nation of plaintiff or defendant, between Goths and Romans: although, in these last cases, the Count was obliged to consult with a Roman jurist, who formed with him a mixed court, in which the Gothic influence still naturally predominated. (90)

(89 a) See above, p. 96. n. 207.

(90) Cassiod. Var. VII. 8.—Sartorius (l. c. p. 100. supr. 292. n. 9. Ed. Paris, 1811.) in opposition to the words of Cassiodore, refers the mixed court, merely to the case of a Roman Plaintiff and a Gothic defendant; and maintains, that the actions of a Goth against a Roman were competent only before the Roman court. He has allowed himself to be misled, by an erroneous interpretation of a passage, in the edict of Theoderic, Art. 139. (Canc. i. 13.) "Auctor venditionis, etiamsi privilegium habeat sui judicis, tamen defen-

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SECTION VI.

UNDER THE GREEKS, IN ITALY.

The Greek Supremacy in Italy was of short duration.

In the middle of the sixth century, Italy passed from the dominion of the East Goths, to that of the Greeks: (91) although, this interruption of German ascendency was only of short continuance, over the greatest part of the country. In A. C. 568, the Lombards

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surus venditionem suam, forum sequatur emtoris." The true meaning of this ordinance is: if, in a challenged sale, the purchaser intimates the threatened eviction to his author, the competent court might be fixed, by considering him as the proper defendant; the suit would then be referred to the court of his nation. On the contrary, however, Theoderic appoints the competency of the court to be decided, according to the nation of the original defendant, that is, of the purchaser—emtoris, or actual possessor. His nation alone, therefore, formed the rule, for determining the court. This passage of the Edict of Theoderic is taken from Paulus, and has been accidentally preserved pure and entire in the Pandects—L. 49. pr. D. de Judic. (5. 1.) As there given, it proves, beyond all doubt, the accuracy of our explanation.

(91) There is some room for difference of opinion, regarding the precise date of the completion of the Greek conquest. The power of the Goths was broken, by the death of Tejas, A. C. 553; and, notwithstanding Justinian's Sanctio Pragmatica, concerning the new organization of Italy, was promulgated in A. C. 554, the country was not reduced to a

began their empire, and soon acquired a widely extended influence. The Greeks continued to possess—Ravenna, along with the Exarchate and Pentapolis,—Rome, with its Ducatus, and—some parts of lower Italy, until the second half of the eighth century, when Ravenna and Rome also submitted to the controul of other masters. Our remarks, therefore, on the maintenance of the Roman judicial system, by the Byzantine Emperors, apply, during the first few years, to the whole of Italy, and, during the two following centuries, to Ravenna and Rome exclusively. (92)

And produced no change on the Civil or Military Jurisdictions.

That no change was made on the internal organization of Italy by the Greeks, is manifest from the constant separation of the civil and military powers, one of its most essential principles. The ordinance on that

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state of peaceable submission until A. C. 555, when the last bands of Goths were subdued, and the great desolation of the country by the Franks had ceased. Muratori annali d'Italia, T. 3. ad. a. 555. The sanctio pragmatica was first edited by Mirœus, at the end of Julian, (Lugd. 1561, fol.) and has been printed, in most of the editions of the Corpus Juris, since that time.

(92) What relates to the countries in Lower Italy, which still continued for some time under the dominion of the Greeks, must be here omitted; because the preservation of the Roman Judicial System and Law in the later times is not within the compass of our present purpose.

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subject, several times promulgated before the dissolution of the Western Empire, and ultimately adopted by Justinian in his Codex, was unrepealed; and the exclusive competency of the Judex Civilis in all cases, where either the defender or both parties were ordinary citizens, necessarily re[illegible] the Judex Militaris, i. e. Dux, or Magister Militum, to those of an opposite description. (93) The phraseology on this subject deserves particular attention. All the other orders of society, styled Privati, in the constitutions of the Codex, as distinguished from the Milites, now bore the title of Romani,—native inhabitants. From this it seems to follow, that the opposite class included not merely the soldiers, but also the emigrants from the Eastern Empire; and thus, from similar circumstances, there may have arisen, among the Greeks in Italy, the same twofold division of Courts, as among the German conquerors. This opinion is still farther confirmed, by the appearance of the

(93) Sanctio pragmatica pro pet. Vigilii C. 23. A. C. 554. "Lites etiam inter duos procedentes Romanos, vel ubi Romana persona pulsatur, per civiles judices exercere jubemus, cum talibus negotiis vel causis judices militares immiscere se ordo non patitur." See above, p. 83. The passage, in the earlier law, which has the most resemblance to this ordinance, is L. 6. C. de jurisd. (III. 13.) A. C. 413.

German foreigners and Greeks, as separate bodies, on solemn occasions at Rome, in the eighth and ninth centuries. Indeed, corporations of the latter existed in Ravenna, so early as A. C. 572. (94) The Sicilian Duces and Ju-

(94) In a Ravennese deed, A. C. 572, (Marini, N. 120. lin. 92.) one of the witnesses is designated as, "Filius Leonti Medici *ab Schola Greca.*" Marini, p. 351, not. 24, refers to a Roman inscription given in Gruter, p. 632, N. 4, in which a Schola *Medicorum* is mentioned; and maintains, upon that authority, that the Greek physicians had formed themselves, at Ravenna, into a separate Collegium, different from that of the native practitioners of the healing art. But, according to the following passage, the words more probably allude to a corporation of Greeks resident in Ravenna, of which the physician Leontius was a member. —Speaking of Rome, Anastasius in vita Leonis III. ad a. 799 (Muratori, III. 1. p. 198. D.), says "Optimates et Senatus, cunctaque militia . . . . simul etiam et cunctae *Scholae peregrinorum, videlicet Francorum, Frisonum, Saxonum atque Longobardorum.*"—The Annales Fuldenses, a. 895, in Freher. Scr. rer. Germ. T. 1. p. 66, ed. Arg. 1717, also narrate, "Omnis namque Senatus Romanorum nec non *Graecorum Schola* cum vexillis et crucibus ad pontem Milvium venientes Regem . . . ad urbem perduxerunt."—A Roman deed, A. C. 955, in Marini, p. 41, infr. states "Aquimolum molentem unum in integrum in Fluvium Tyberis *justa Scola Saxonum* posit." Scola here signifies the quarter of the city inhabited by the Saxons, the vicus Saxonum Anastas. ap. Murator. III. 1. p. 233. B.—Immunities, from taxations in Rome, are granted to the Scola Saxonum, in the 9th, and to the Scola Anglorum, in the 11th centuries. Hist. Anglicanae Scriptores X. ed. R. Twysden,

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dices of the Novelle, by which Justinian remits the appeals from Sicily to the Quæstor Palatii in Constantinople, may also be interpreted, with reference to the same distinction. (95) Now, the cities, with their courts, formed an essential part of the constitution thus preserved, and their continuance may therefore, with the greatest probability, be anticipated. Our knowledge of their fate, however, does not rest upon conjecture, for their preservation is established by an unusual abundance of the most important and

p. 130. l. 51. 355. l. 55. 469. l. 21. Lond. 1652, fol.—Similar incorporations of foreigners, in the Lombardic cities, since the twelfth century, shall be afterwards noticed. These Scholae of foreigners must be carefully distinguished from the Scholae *militiae:* e. g. Anastas, ap. Murat. III. 1. p. 185. C. and p. 227. E. "dixerit universas *Scholas militiae.*" —How exceedingly numerous the Greeks soon became, in the newly conquered provinces of Italy, is proved by many circumstances; and, among others, by a variety of subscriptions to deeds, which, although in the Latin language, are, from ignorance of the Latin alphabet, written with Greek characters. Marini papiri, p. 253. not. 47.

(95) According to the complete text in a Vienna manuscript of Nov. 104. de Praetore Siciliae, of uncertain date, Justinian ordains: "tribuniano questori sacri palatii .... volumus ut si quando appellatum fuerit a praetore vel *a duce vel ab aliquo judice* ejusdem insulae appellationes omnes ad tuum fastigium tuamque sedem remittantur .... neque ad anteriorem romam, neque ad alium judicem hujus regiae civitatis eatur" rel. The extract in Julian, Const. 68., excepting a few omissions, is nearly the same. See below, p. 336. n. 113.

direct documentary proof. A number of original deeds on papyrus, from the time of Odoacer, downwards, during the whole period of the East Gothic, and a great part of the Greek supremacy, have been preserved to our times. These are, in many respects, extremely valuable; and especially, from the information which they contain, regarding the Judicial system. We purpose now to examine them together, and have been induced to reserve the earlier deeds, until the present occasion, because many of their dates cannot be accurately determined, and the constitution, which they prove to have existed during the different empires, always remained perfectly the same. The connected examination of the whole series will establish, in the clearest manner, what might be considered as almost incredible, that, amidst all the revolutions of government, no change ever overturned the old public relations of the Romans.

1. Of many of the deeds, so important, from the proof which they furnish of the existence of the municipal institutions, Marini was the earliest editor; and even those previously known, were first rendered useful, by his excellent arrangement and commentary. (95 a) The oldest of the instruments, of which

The continuance of the Municipal Institutions is proved, by Ravenna Deeds, A. C. 489.

(95 a) See below, chap. xii. n. 4. and Text.

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we are now to examine the series, is dated A.C. 489. (96) King Odoacer had given large donations to Pierius; and, among the rest, some lands in Sicily. The deed of donation is subscribed by Andromachus, the Magister Officiorum. The procedure commences, by the attornies of Pierius appearing before the Curia of Ravenna, and requesting the donation to be protocoled. The deed of donation is then read, and its whole contents are engrossed in the protocol. A deputation of the Curia next leave the Court, in search of the Royal Notary, Marcianus, the writer of the deed, for the purpose of obtaining an acknowledgement of its authenticity. On their return, the deputation announce that the deed is genuine; and, after this report has been added to the protocol, Pierius' attornies, accompanied by a royal procurator, set out for Syracuse, with an authenticated narrative of the procedure. There the copy is again verbatim engrossed, and the decemprimus deputed to give tradition of the

(96) Marini papiri N. 82. 83. The original N. 83, of which an imperfect edition previously existed, may be seen in Vienna: on the other hand, the MS. N. 82., is in Naples, and was first edited by Marini, who discovered that the connection between the two parts was complete. The beginning and end, however, are imperfect. The date of the deed of donation only is given; although it is probable, that the registration and tradition were not long delayed.

lands. On the following day all appear again before the Curia, who order—the statement of tradition having been given, to be appended to the original protocol, and—an official copy of the whole delivered to Pie[illegible] attornies. Our deed is this certified [illegible]he protocol from Syracuse, with the [illegible]ignatures. In it, also, the protocol [illegible]na, containing the deed of dona[illegible]rding to the above described pro[illegible]inserted. From this deed, we de[illegible]h valuable information, regarding the municipal institutions. It proves—that all the formalities of business were the same as in former times, which is also confirmed by the following deeds:—that the Magistratus, i. e. Duumvir in Ravenna proceeded on this occasion without the assistance of his colleague,—that the two Magistratus in Syracuse conducted the ceremony,—that there were Principales in Ravenna,—and Decemprimi in Syracuse.

2. This is a Protocol from Ravenna of a registered donation, dated in A. C. 491, when Odoacer was besieged in that city by the Goths. (97) The registration also probably took place at the same time. At the head of the Curia, appears Flavius Projectus, who, although styled Quinquennal merely in the deed itself, is yet designated in the subscriptions, as A. C. 491.

(97) Marini papiri, N. 84. The commencement is wanting.

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both Quinquennal and Magistratus, and consequently must have held both offices.

A. C. 504. 3. Another Protocol from Ravenna, A. C. 504, during the period of the Gothic supremacy, contains the registration of a deed of sale. (98) Firmilianus Ursus as Magistratus, and several Principals, are mentioned.

A. C. 540. 4. Two solemn gesta are contained in one Protocol from Ravenna. The first relates to a deed of sale of estates in the Faventine territory; and the second, to a petition of the seller—Epistula traditionis, dated 3d January 540, to the Curia of Faventia, "Defensori Mag. Ql. cunctoque Ordini Curiæ Civ. Faventine," praying that tradition might be completed with all possible speed. A deputation is then sent to the seller, for the purpose of inquiring if the deeds be genuine. After their return, the Protocol is closed, and an authenticated transcript given. (99) From this procedure, it is plain, that in A. C. 540, a Defensor, or at least a Magistratus and a Quinquennal were at the head of the Ordo or Council of Faventia. Pompulius Plautus appears as Magistratus in Ravenna; and, besides him, four Principals with an Exceptor.

(98) Marini papiri, N. 113. The beginning and end have not been recovered.

(99) Marini papiri, N. 115. The beginning is wanting.

5. The original of an "epistola tradition-is," of 21st March 540, is likewise addressed from Ravenna to the Defensor, etc. of Faventia, and is quite similar to the last noticed Protocol. (100) Both have been prepared about the time, when Ravenna passed from the supremacy of the Goths to that of the Greeks, which is generally placed at the commencement of A. C. 540, although the mandates to Faventia imply a free intercourse between the two cities, and contradict the supposition of Ravenna being besieged. On this account, many have proposed to date the conquest from A. C. 539. (101) But, Marini has shown, by unanswerable reasons, that the siege could not have been begun, until after 21st March 540—the date of the last of these Epistolæ. Perhaps, this opinion is also supported by the circumstance of the Sors Barbarica, (102) or Gothic third of the land, being mentioned in the deed of sale to which the mandate of the 3d January 540 applies: since, that third must have ceased with the Gothic empire, and could hardly have been mentioned in a subsequent deed. This reason, however, is not decisive; because,

A. C. 540.

(100) Marini papiri, N. 116. Apparently complete.

(101) Muratori annali d'Italia, T. 3. p. 392. Gibbon, chap. 41. Vol. 5. p. 201. note q. Lond. 1825, 8vo.

(102) Marini papiri, p. 336.—N. 115. lin. 6. See above, p. 317. n. 82.

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the date of the mandate only to Faventia is given, and not that of the deed of sale itself; which makes it possible, although certainly not probable, that the latter had been prepared a considerable time before.

A. C. 553. 6. In the original of a Ravennese deed of donation A. C. 553, a clause is inserted for the purpose of enabling the donee to proceed by unilateral gesta,—a permission, however, which the donor, a lady, is said to have already granted in presence of the Decurions of the city. (103) The members of the Ravenna-Council, generally styled Principales in these deeds, are here called Curiales.

A. C. 557. 7. An official transcript of a Municipal Protocol of Rieti, A. C. 557, contains the nomination of a guardian. (104) It is subscribed by six Decurions—Curiales; without either a Magistratus or Defensor.

A. C. 564. 8. Our next information in the order of time, is derived from the celebrated Instrumentum Plenariæ Securitatis. (105) The receiver of a discharge acknowledging the pay-

(103) Marini papiri N. 86. lin. 43—49. " . . . quemadmodum et in praesenti Curialibus hujusce Urbis sum professa."

(104) Marini papiri N. 79.

(105) Marini papiri, N. 80. The beginning and end are defective. It had been previously quoted by Cujacius (obs. IX. 26.),—published by Brissonius (de form. lib. 6. fin.), and—received for some time as the Testament of Julius Cæsar. Conradi's amendments and explanations are of great value (parerga, p. 194. 427. 439.)

ment of certain legacies, A. C. 564, lays it before the Curia of Ravenna, where it is copied into the books of Court; and, after a deputation had ascertained its genuineness from the granter, a copy of the whole pro- [illegible] given, which is our deed. An agens [illegible] conducted the solemnity.

9. In the certified copy of a Protocoled donation, A. C. 572, before the Curia of Ravenna, (106) Melminius Laurentius as Magistratus, several Principals, and the Exceptor Gunderit, are declared to have been present at the ceremony. A. C. 572.

10. Mannanes' testament, of which this is the original, was made at Ravenna, A. C. 575, and opened, after the death of the testator, in the same year. (107) The Magistratus, Melminius Cassianus certifies, at the end of the seven subscribing witnesses, that the testament had been opened, and read through in his presence. A. C. 575.

11. The most instructive of all these deeds, however, is a Municipal Protocol of Ravenna. An application was made on behalf of the church of that city, for certified extracts from several earlier protocols, concerning the opening of some testaments, in which it had been A. C. 552—575.

(106) Marini papiri, N. 88. and 88. A. Although the beginning is incomplete, the conclusion is entire.

(107) Marini papiri, N. 75. The end is complete, but the commencement defective.

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either instituted heir, or left considerable legacies. The protocols being opened in succession, the words, at the commencement of each, are read over and entered into the present protocol, which is probably the copy ordered at the time for the use of the applicant. (108) How many protocols have been extracted, it is now impossible to say; since the beginning of this transcript is wanting. Of the five which still remain, the first has no date; and the others were prepared in the years 480, 474, 521, 552, respectively. In all, either the Magistratus alone conducted the ceremony, or they were assisted by the Defensors and Quinquennals, and sometimes also by the Principals. Our protocol, dated between A. C. 552 and 575, is subscribed by two Magistratus.

A. C. 591 and 616.

12. and 13. Two Ravenna deeds of sale, A. C. 591 and 616. In both, the purchaser is allowed, by himself and without the further participation of the seller, to apply for gesta municipalia, concerning the transaction—a plain proof of the continuance of the former civic institutions. (109)

A. C. 625.

14. This protocol from Ravenna, A. C. 625, concerning a donation, although very

(108) Marini papiri, N. 74. and 74. A. The beginning is defective, but the end complete.

(109) Marini papiri, N. 122. lin. 67. N. 123. lin. 41.

much mutilated, sufficiently establishes the preservation of the judicial system of the cities, in the same state as in the preceding deeds. The usual form of dialogue has been adopted, and fortunately a line preserved, where Magistratus, in the plural number, are expressly mentioned. Besides conducting the whole judicial act, these Magistratus put the questions, and issue the orders. (110)

The Duumvirs are now styled Magistratus. Exceptor, Notarius and Tabellio bear their original meaning.

From all these deeds it appears, that the title of Duumvirs was no longer employed, and that these supreme municipal authorities were now styled Magistratus, not occasionally and with the vagueness of a general designation, but uniformly, as the technical and proper title of the office. This change in the phraseology, and the use of Exceptor in the old signification, have been already noticed. The term Notarius is also applied to an officer in the chancery of the principal church of Ravenna, in the same sense, as it was formerly to the members of the Imperial chancery. (111) Tabellio has preserved its old

(110) Marini papiri, N. 94. lin. 6. "quæso laūū (laudabilitatem vestram) *optimi Māg.* uti eadem a me suscepi relegi actisque indi præsentibus jubeatis."

(111) See above, p. 30. 51–53. Marini papiri, N. 74. Col. 8. lin. 1. (about A. C. 575.) "Domesticus Primicerius *Notariorum* et Thomas Secundocirius idem *Notariorum* una cum Cypriano et Thomate defensoribus *Ecclesiae sanctae Catholicae Ravennatis.*"

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meaning; but Forensis is used as a synonymous designation of the same office; and, it is worthy of remark, that the Tabellions in Ravenna, and perhaps also in the other cities, were already formed into a Schola, or regular corporation. (112)

The Pater Civitatis is probably the old Curator, or Quinquennal.

Another trace of the preservation of the Municipal constitutions, in the time of Justinian, is found in the above mentioned Novel, concerning Sicily. It is there ordained, that all matters, requiring the confirmation of a higher authority, such as the election of a Defensor, or of a Pater Civitatis, should not be remitted to Italy, but to the Quæstor Palatii in Constantinople; and that the ultimate sanction should proceed from him. (113) The omission of the old magistrates by Justinian is no proof against their exist-

(112) Marini papiri, N. 74. col. 4. lin. 4. "testamentum feci idque scribendum dictavi Domitio Johanni For." ibid. col. 7. lin. 2. "Deusdedit For. Civ. Classis Rav."—Marini, N. 110. lin. 38. "Prim Scolx Forx Civ Rav seo Classx, that is, *Primicerius Scholae Forensium* Civitatis Ravennatis seu Classensis." Compare Marini, p. 326. not. 9. 10.

(113) Nov. 104. According to the Vienna MSS. (see above, p. 326. n. 95.) "Non solum hec tuam jurisdictionem respicere decernimus set etiam si quid aliquid (l. aliud) civile ornatur (l. oriatur) quod confirmatione indigeat *i. pro defensoribus vel patribus civitatum decretum* nam id quoque ad tuam sedem remitti." Julian's words in Const. 97. are "Et si Defensorum in civitatibus creandorum vel Patrum decreta opus sit celebrari, apud eundem inlustrissimum virum celebrentur."

ence at this period; for, their appointment to an office, which had descended from the early times of freedom, might be considered as not requiring any confirmation. The exact agreement of this ordinance of the Novelle with Cassiodore is extremely deserving of attention. The Gothic historian gives no formula for the confirmation of the Magistratus, i. e. Duumvirs, although they unquestionably existed in his time; but only for the Defensors and Curators, i. e. Quinquennals. (113 a) In like manner, Justinian, when prescribing the mode of confirmation, passes over the Duumvir, while he names the Defensor, and the Pater Civitatis. From this it follows, with the highest probability, that the Pater Civitatis filled the old office of Curator or Quinquennal. The name itself, and its easy adaptation to the early constitution, favour this theory.

The Epistles of Gregory the Great prove the continuance of the Municipal Institutions.

Finally, the Epistles of Gregory the Great, who was Pope from A. C. 590 to 604, afford numerous proofs, that the judicial system of the cities was preserved by the Greeks. (114) Many of these Epistles, containing communi-

(113 a) See above, p. 48. n. 84.

(114) The Epistles are quoted from the Benedictine edition of his works, Tom. ii. p. 477. seq., Paris, 1705, fol. Each of the fourteen books contains the Epistles of one year, beginning with A. C. 591 (Indictio IX), and ending with

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cations to cities under the Greek supremacy, are addressed—"Ordini et Plebi;" and thus prove directly the existence of the Municipal Curiæ or Councils. (115) Other Epistles to the very same cities are entitled, "Nobilibus et Plebi," which must be synonymous with the preceding style of address. (116) Farther, Gregory gives to the Bishops of Rimini and of Tyndaris in Sicily, commissions to receive certain donations; and reminds both of the necessity of the Gesta Municipalia. (117) In other Epistles to the Bishops of Squilla-

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604 (Indictio VII). From these the date of the others may be easily determined. As many of the Italian cities, at this very period, had either passed, or were on the eve of passing, from the Byzantine to the Lombardic Empire, it has been thought proper to subjoin a reference to the principal work on the Italian Geography of the Middle Ages, viz.—diss. chorographica (of Beretta), from Muratori script. Tom. X. princ.

(115) The cities are—Rimini. Epist. Lib. 1. 58.—Neaples, Ep. II. 6. 9.—Crotona. Ep. II. 39. (Beretta, p. CCCXI. med.)—Albanum, Ep. III. 11. (Beretta, p. CCXXVII. infr.)—Terracina. Ep. III. 14. (Beretta, p. CCCIII. med.)—Ravenna. Ep. V. 26.—Auximum. Ep. IX. 90. (Beretta, p. CLXXX. med.)—Taurianum, Thurium, and Consentia, Ep. X. 16. (Beretta, p. CCCVII. med. CCCX. med.)—Panormus in Sicily, Ep. XIII. 14.

(116) In the Epistles to Ravenna and Naples, Ep. VI. 31. II. 6. X. 62.—Likewise, "Nobilibus ac possessoribus in Sardinia insula consistentibus;" in Ep. IV. 25, just as Curiales and Possessores are frequently conjoined.

(117) Ep. II. 12. IX. 84.

cium and Caralis in Sardinia, an island since Justinian's time belonging to the Greeks, the Pope prohibits the giving of ordination to any bound to serve in the Curia. (118) From the address of several Epistles, in the course of five years, to Theodore, Curator of Ravenna, (119) we learn—that the office of Curator had been preserved, and—that the same person might hold it for a much longer period than formerly, perhaps even during life. Moreover, in an Epistle to Naples, mention is made of a Patronus Civitatis, (120) who, for the reasons already given, was the same functionary with the Curator.

Their preservation, even after the overturn of the Greek power, is also certain.

Beyond all doubt, therefore, the former constitution of the Italian cities remained entire, not only under the Greeks, or until nearly the close of the seventh century, but also during many years afterwards, when the greatest part of the

(118) To Squillacium (Scyllacium, Beretta, p. CCCXI. infr.) Ep. II. 37. med. "Nec bigamum ... *vel curiae* vel cuilibet conditioni obnoxium, ad sacros ordines permittas accedere." The words "vel curiae" are wanting in several MSS.; and have been improperly rejected by the Editors. *ibid.* not. d. —To Caralis. Ep. IV. 26. fin. "Quaerendum quoque est ne forte fuerit bigamus ... aut *ne obnoxius curiae* compellatur post sacrum ordinem *ad actionem publicum redire.*"

(119) Ep. IX. 98. X. 6. XII. 6. XIII. 47.

(120) Ep. IX. 69. princ.

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country had been occupied by the Lombards. (121) The probable origin of the subsequent changes may be reserved for future inquiry. The next section, however, must be devoted to an examination of the accounts concerning the constitution of the city of Rome, and the military system of this period.

SECTION VII.

UNDER THE POPES AND EMPERORS, IN RAVENNA AND ROME. (122)

The Pope acquires temporal dominion.

About the middle of the eighth century, the Greeks were probably on the point of

(121) Maffei, Verona illustr. P. 1. p. 494. Verona, 1732. 8vo, maintains, that the Greeks, immediately after the conquest, subverted all the former municipal establishments; an opinion, equally at variance with the authorities on which he founds, and with the fact of the existence of these institutions in Italy, under the Lombards; because, if the judicial systems of the cities had been once entirely overturned, their subsequent restoration by the Lombards becomes altogether improbable. Maffei's principal argument in support of his opinion, is—the appointment of Duces; but, we shall afterwards show (p. 364), how these were united with the municipal system.

(122) The principal authorities on the institutions to be now examined, are, (1) Codex Carolinus, i. e. a cotemporary

yielding to the Lombards the remainder of their conquests in central Italy, when another power, now for the first time beginning to assume a rank among temporal potentates, intercepted the acquisition, and became the cause of even the Lombards themselves being subjected to a foreign yoke.

And receives from Pepin Ravenna and the Exarchate, including Pentapolis.

King Aistulf, A. C. 751, or 752, (123) having conquered Ravenna and threatened Rome, the Pope applied for assistance to the Frank Pepin, who thus became a Patricius of Rome and promised, in return, to conquer Ravenna with the Exarchate, including Pen-

collection of 99 espistles from the Popes to Charles Martell, Pepin and Charlemagne, which is preserved in the Vienna Library, and has been often printed. The quotations refer to the edition in Muratori Script. rer. It. T. 3. P. 2. p. 73. sq. as the most common, and the numeration of the MS. is also followed. The latest and rarer edition, (in the first volume of Cenni Monumenta dominationis pontificiae, 2 vol. Rom. 1760, 1761. 4to), contains few important alterations, and shall only be quoted on the most doubtful passages. (2) The collection of deeds by Fantuzzi, Monumenti Ravennati, Venezia, 1801—1804, 6 volumes 4to. For the historical details, the fourth volume of Muratori annali d'Italia is very useful.

(123) According to Anastasius, A. C. 752. [Mur. Script. T. iii. P. 1. p. 166. A. and p. 167. B.]; although a deed of Aistulf, preserved in the archives of Farfa, is dated, from the Palace of Ravenna, on the 4th July 751. This instrument has been—referred to by Muratori antiqu. It. T. 5. p. 889. A.;—consulted by him in his annali. T. 4. p. 304. med. —and printed by Fantuzzi, T. 5. p. 203. and preface, p. xiii.

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tapolis, for the Pope. (124) Aistulf defeated, but unmindful of his engagements, and besieging Rome of new, was a second time overthrown. The fulfilment of Pepin's promise followed (125); and, although the donated countries were nominally transferred to the Pope, thirty years elapsed before their quiet submission to his sway. The Lombards appear to have failed, from the first, in the complete fulfilment of their treaty, and to have afterwards resumed or plundered the ceded country. (126) In the city of Ravenna, the Archbishops repeatedly usurped the reins of authority; and several of the powerful citizens so entirely assumed the govern-

(124) In A. C. 754, Muratori annali d'It. T. 4. p. 310. There is no deed in existence on this first grant; although, the fact itself is unquestionable. Fantuzzi, (T. 6. p. 264, and Pref. p. xv.) has, no doubt, edited such a document from the Venetian Codex Trevisanus. But its spuriousness is evident, from the single circumstance of almost the whole of Italy being included in the gift. Many later historians concur with this statement of the extent of the donation. Nevertheless, the practical consequences and the whole Codex Carolinus leave no doubt, that Pepin's largess applied only to Ravenna and the Exarchate, and neither to Rome, nor the old Lombardic Provinces. Muratori annali. T. 4. p. 319. 330. 359.

(125) The first war was, A. C. 754; and, the second, 755. See Muratori annali. T. 4. p. 311. 312. 314.

(126) Codex Carolinus, N. 8. 15. 17. 21, (Ed. Muratori, p. 106, 122. 128. 137.)—Muratori annali d'Italia. T. 4. p. 317. 319. 322. 327. 341—347. 354.

ment, as to overturn for a short period the Papal supremacy, even in many of the adjacent cities. (127) But all these animosities were trivial and transitory. Of the Greeks alone the papal hatred continued implacable, for to them, as to the old proprietors, the donated country, if cleared of the Lombards, might have been restored. The approach of the Greeks to Ravenna produced, on one occasion, a speedy adjustment of all differences; and, dread of the common foe led to the establishment of peace; (128) although, the Papal government was not firmly settled, until some time after Charlemagne had ascended the Lombardic throne.

Where his authority, although at first independent, was subjected to that of the Emperors.

Several have believed, that the donation of Pepin had the revenues and not the government of the country, for its object; or, at least, that such were the original terms of the grant. (129) Still, the real exercise of

(127) Codex Carolinus, N. 51. 52. 54. 75. (ed. Mur. p. 199. 203. 205. 236.)—Muratori annali. T. 4. p. 347. 371.

(128) Codex Carolinus, N. 28. 30. 33. 34. (p. 151. 153. 158. 159.)—Muratori annali, T. 4. p. 329. 330.—Indeed, some years afterwards, A. C. 770, it is again said, "Perfida ac fœtentissima Langobardorum gens, quæ in numero gentium nequaquam computatur, de cujus natione et leprosorum genus oriri certum est." Cod. Carol. N. 45. (ed. Muratori, p. 179. C. ed. Cenni, p. 283.)

(129) Spittler Staatengeschichte, Th. 2. S. 86.—Sismondi, T. 1. p. 149. 150. 168., (p. 130. 131. 148. Ed.

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sovereign authority by the Pope is undoubted. He sent Judges and other officers to the donated cities, and accused those of sedition who opposed their jurisdiction. (130) Even the character of this supremacy is defined with tolerable precision. The donation itself is to the Church and the Roman Republic; (131) and the Pope is appointed Patricius, or Governor of the country, with the same extensive powers formerly belonging to the Exarch, and with the highest rank next to the Emperor. (132) Now, this Roman repub-

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Paris, 1826.) maintains, that although the donation included the sovereignty of the country, the Popes actually acquired only the domains and revenues. But no such distinction is mentioned in the authorities; and it is quite inconceivable, that the Lombards, or the Archbishops of Ravenna, should have been content with depriving the Popes of the mere rights of sovereignty, while they left the revenues at their disposal.

(130) Codex Carol. N. 54. (Ed. Mur. p. 206. D. ed. Cen. p. 322.) "Nam *et judices ad faciendas justitias* . . . in eadem Ravennatium urbe residentes, ab hac Romana urbe direxit, Philippum . . . presbyterum, simulque et Eustachium quondam ducem." See N. 51. 75. (Ed. Mur. p. 201. 235.)

(131) Codex Carol. N. 8. (Ed. Mur. p. 109. B.) "Ecclesiæ suæ, *Reipublicæ Romanorum* . . . restituere." Likewise in N. 45. (p. 181. E.), and in several other passages. Muratori annali, T. 4. p. 314. 315. 319.

(132) Cod. Carol. N. 85, (Ed. Mur. p. 251. C. ed. Cen. p. 521. ("quia, ut fati estis, honor Patriciatus vestri a nobis irrefragabiliter conservatur . . . simili modo ipse *Patriciatus B. Petri* fautoris vestri, tam a sanctae recordationis Domno Pipino magno rege, genitore vestro, in scriptis in integro concessus, et a vobis amplius confirmatus, irrefragabili jure

lic, placed under the controul of the Pope, was neither the city of Rome, nor the provinces subject to the detested Greeks; but the old Western Empire, which was thus revived, although as yet without any apparent head, most probably under the expectation of being afterwards enabled to advance from this faint commencement, to a more complete and formal restoration. If this view be correct, the Papal project was nothing else, than an attempt to overturn the lawful sovereign—the Byzantine Emperor, whose possession of these countries had indeed resembled, in many respects, that of a usurper. More anxious to rule as conquerors, than intent on restoring the old privileges and laws, the Greeks never adopted the plan of re-establishing Italy, as the recovered half of their former empire. The supremacy of the Frank king is no doubt

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permaneat." Charles' Patriciate extended over Rome, and that of the Pope over the Exarchate. Muratori annali, T. 4. p. 405—409. 429. 435. The explanation of that passage in Cenni, p. 294, is very curious. Saint Peter, as an inhabitant of heaven, cannot, by any supposition, be invested with temporal sovereignty, but must be considered as merely a guardian and defender; and, consequently, Charles' Patriciate being similar to Peter's must likewise consist in mere Patronship. Thus the Pope, who became possessed of secular power in Rome much earlier than in the Exarchate, chose the King of the Franks, as his Patricius, patron or protector, in that city.

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irreconcileable, with this account of the Papal designs. (133) But, in reality, the Pope himself maintains his rights to be perfectly independent; (134) and when, in A. C. 784, Charlemagne wished to remove certain columns and other decorations, from the Palace at Ravenna, Hadrian I. granted permission upon a petition from the King; which is quite at variance with the notion of the Papal power not being at this time supreme. (135) The restoration of the Imperial title, however, changed at once the rank of the Pope as a ruler; and, from that time, his dependency cannot be questioned. (136)

Charlemagne, and not Pipin, bestowed civil power on the Pope, in Rome.

The whole of this discussion, relates entirely to Ravenna, along with the Exarchate; and, there is no authority for stating, that Rome was included in the donation. The Pope appears to have possessed no sovereignty in Rome, and the only power

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(133) The King of the Franks was indeed indispensable to the Pope, as a temporal protector; and this necessity may explain many of the circumstances which have been erroneously considered, as evidence of a supremacy. Muratori annali, T. 4. p. 385.

(134) See the quotation in n. 132. [The absolute supremacy of the Pope's rights is also maintained by Gibbon, Rom. Emp. Chap. 49. Vol. vi. p. 209. infr. Lond. 1625, 8vo.]

(135) Cod. Carol. N. 67, (Ed. Mur. p. 223.)

(136) Thus, in A. C. 808, Charlemagne appears in the Exarchate, as Judge over the Pope. Muratori annali, T. 4. p. 469.

in that city flowed from the Patriciate of the Frankish King. (137) But, when Charles became Emperor, A. C. 800, it is very probable, that he transferred his former rights of Patricius to the Pope; (138) at least, the following facts favour this supposition. Soon after Charles received the Imperial crown, the Pope appears along with him, as possessing temporal power in Rome: which could only have arisen from his acquisition of that degree of independent authority appertaining to the Patriciate. (139) And, when Otto I.,

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(137) See the quotation, n. 132. This subject is expressly discussed by Muratori annali, T. 4. p. 315. 323. 329. 332. 353. 375.

(138) Muratori annali, T. 4. p. 440. infr.—Indeed, Spittler, Staatengesch. Th. 2. S. 86, denies the Pope's sovereignty in Rome, during the subsequent period also; an opinion at variance even with the authorities quoted in support of it.

(139) The Constitution of Lothaire I., A. C. 824, is noticed above, p. 142. It contains the following regulations, concerning the government of the territory, subject to Rome. Cap. I. Both the Emperor and the Pope may grant protections. All are bound to obey the Pope, and his Duces, or Judices, (repeated in Cap. 9.)—Cap. 4. The Missi are appointed by the Emperor and the Pope. Guilty Duces and Judices may be either punished by the Pope himself, or remitted for correction to the Emperor.—Cap. 5. The Judicial functions are exercised, in the name of the Emperor and the Pope.—Cap. 8. When the Emperor is residing in Rome, all the Duces and Judices must appear before him; in order that he may obtain a knowledge of their numbers and their names, and may impress them with the importance

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A. C. 962, united the Imperial and German crowns, the old ordinances of Lothaire I. regarding the Roman territory were, for the most part, verbatim repeated. (140)

The same judicial system prevailed in Ravenna, Rome and Naples.

These introductory remarks may now have prepared us for entering upon a detailed examination of the remains of the Judicial system. It would be erroneous to suppose, that the Lombards established their institutions in Ravenna: for, the Lombardic sovereignty in that city was of too short continuance, to produce any permanent impressions. All the countries and cities of Italy, under the Greek dominion, possessed and retained similar institutions: as is proved by the general agreement in the nomenclature and duties of the public functionaries. One uniform system prevailed in Ravenna, Rome and Naples: although, the following titles, as connected more intimately with our subject, seem to require a special explanation:—(a) Tabellio, Notarius, Curialis, Exceptor—(b) Consul, Dativus, Judex, Pater Civitatis,—(c)

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of their duties. It is also mentioned by historians of the same period, that the Emperor sent Judices to Rome. Muratori annali, T. 4. p. 527.

(140) Goldast constit. Imp. T. 2. p. 44—46. See above, p. 147. n. 99. The same enactments are found, in a Constitution of the Emperor Henry II. A. C. 1014. (Goldast Const. Imp. T. i. p. 227): although its authenticity be very doubtful.

Dux, Magister Militum, Tribunus. The inquiry concerning the signification of these terms must, however, for the most part, be limited to Ravenna and the adjacent cities: because, regarding these alone, we possess a rich collection of deeds; nevertheless, by a safe analogy, the same remarks may be extended, without farther proof, to Rome. To facilitate this investigation, these titles may be divided into three classes; (a) Persons employed in the writing and copying departments,—(b) Civil functionaries, and—(c) Military commanders.

Tabellio, Exceptor, &c. still occur.

A. The first order includes the persons employed in the writing and copying departments. Tabellio retains its original signification, and denotes rather a profession and a business, than a public employment. The old corporate constitution of the Tabellions had survived without any interruption; (141) and the Prototabellio, occasionally mentioned, is the president of this incorporation, and the same person with the Primicerius of pre-

(141) See above, p. 53. The oath of the Tabellions, in A. C. 1200, is given by Fantuzzi, V. 300.—In A. C. 1227, some persons not members of the constituted body, attempted to carry on the business of Tabellion: but a judgment of the Archbishop sustained the exclusive rights of the Incorporation, over which a Major was then, and for the future, appointed to preside. Fantuzzi IV. 347.

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ceding times, or with the Major of the thirteenth century. (142) Notarius was still, as in the earlier periods, peculiar to certain officers in the Chancery of the Church of Ravenna, who might also be Tabellions. (143) This distinction, however, gradually disappeared, and Notarius became the general term, as among the Lombards. (144) Finally, and what is of most importance for our purpose, the old Exceptor of the Curia, often occurs under that, or similar designations. He is most frequently styled Curialis, and was generally, at the same time, a Tabellion. (145)

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(142) See above, p. 335. n. 111. & 112. "Apollenaris in Dei nomine *Proto Tabellio* hujus Civitatis Ravenne." A. C. 977. Fantuzzi I. 195.

(143) See above, p. 335. "Ego Ubaldus *Ravenne Tabellio*, et *Notarius Sancte Ravennatis Ecclesie* scripsi." A. C. 1176. Fant. II. 146. Likewise in many other deeds. The same phraseology was applied also to the Pope's Chancery in Rome.

(144) In Forlimpopolo, A. C. 1043, and in Rimini, A. C. 1148, Notarius is used in the Lombardic sense for Tabellio, Fantuzzi, IV. 209. II. 130. 131. Tabellio very frequently occurs in Ravenna, during the thirteenth and fourteenth centuries; and, in the statutes of that period, it is used as synonymous with Notarius. Fantuzzi, IV. 16. 65.

(145) In Ravenna, about the middle of the ninth century, "Moyse Tabellionem *et Exceptorem Curiae* hujus Civ. Rav. scribend. rogavi." (Marini papiri, N. 98. lin. 47, and p. 314.) In the same city also, the Tabellio Dominicus

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The Curia in Ravenna, and the Senate in Rome, were likewise continued.

B. The civil functionaries form the second class. On this subject, the uninterrupted continuance of the old Curia in the city of Ravenna itself is of the greatest importance. Its endurance is clear beyond contradiction, both—from the already quoted passages, in which the Exceptor of the Curia is expressly mentioned, and—from the term Curia being applied to a building, which must be understood, in the old Roman sense, as the place where the municipal council held their assemblies. (146) In the city of

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bears the following titles,—A. C. 903. "Dominicum Tabellionem *Extractorem Curie publice ujus Civ. Rav.* (Fant., I. 103, twice on the same page);—A. C. 908. "*Exscriptor Curia* . . Civ. Rav." (Marini papiri, p. 318, not. 27, who without necessity reads *exceptor*)—A. C. 909, and also in 910. "Dominicus tabellione, et *Curiale hujus Civitatis Ravenne.*" (Fant. I. 106. 107);—A. C. 930, in an imperfect deed. "Dominicus superna illustrationem *Prototabellionem* . . . *Curiae et exceptorem hujus Civitatis Ravenne.*" (Fant. VI. 9.) Likewise, in Ravenna, A. C. 939. 947. 953. 955, Petrus appears as Tabellio *et Curialis* hujus Civ. Rav. (Fant. II. 18. I. 125. 135. III. 2.)—and also in the same city, A. C. 955. "Leo in Dei nomine ab Urbe Ravenne Tabellione *et Curialis* Provinciis Romanorum." (Fant. II. 20.)—In Naples, A. C. 1065, "Scripta vero per manus Johannis *Curialis et Scriniarii.*" (Muratori antiq. It. I. 198. infr.)—In Rimini, in the twelfth century, a "*Scriba publicus*" is twice mentioned. (Fant. V. 292. 299.)

(146) A. C. 978, "in regione quae dicitur Caput porticis *non longe a curia.*" Fant. I. 202.

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Rome, we might be inclined at first to doubt the continuance of the Senate, from its dissolution in A. C. 553 by Tejas, and re-establishment in A. C. 1142. (147) But this overthrow could not have been complete; and the restoration must rather be understood as the revival of formerly diminished privileges and impaired dignity, than as a new grant of powers which had long ago ceased: for, it is undeniable, that during all these intervening centuries, there is clear evidence of the uninterrupted continuance of the Roman Senate. (148)

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(147) The following works relate to the history of the Roman Senate.—Curtius de Senatu Romano, Halae, 1768. 8vo. —Ant. Vendettini del Senato Romano, Rom. 1782. 4to.—Fr. Ant. Vitale Storia diplomatica de' Senatori di Roma, Rom. 1791, 2 vol. 4to.—The first includes the period from Augustus to the latest times. The researches of the second are confined to the middle ages. The third founds upon deeds, and gives from them a history of the later "Senatore di Roma, to which a short account of the earlier times is prefixed, by way of introduction. Concerning the destruction and revival of the Senate, see Curtius, l. c. §. 115. 166. 168. and Vendettini, l. c. p. 15. 118.

(148) The Senate is mentioned—in A. C. 554, in "Justiniani pragmatica Sanctio," C. 19. 27. — In the Epistles of Gregory the Great — In Anastasius frequently — In the Codex Carolinus. — In the Constitution of Lothaire, in A. C. 824: (See above, p. 142).—In the eleventh and twelfth centuries often; thus, A. C. 1013, "Henricus . . . . a *Senatoribus duodecim* vallatus."

The offices or titles, mentioned in connection with the Civil Constitution, are—Consul, Pater Civitatis, Judex, and Dativus. The Consuls are of such frequent occurrence, in the centuries of which we have been speaking, throughout the whole of the Exarchate, Rome and Naples, (149) that they could not have possessed the influence and authority appertaining to the old office. (150) This becomes still more obvious, by the circumstance, of the same person often uniting the Consulship with other employments, such as Negotiator and Tabellion. (151) In the deeds, likewise, attested by many witnesses, the Consuls are generally placed among the last. All these peculiarities are incompatible with a condition of elevated rank. To complete this account of the mysterious character and duties of the Consuls, we must add, that, notwithstanding the existence of the old Curiæ, no Principals

The term Consul denoted a Decurion, and afterwards a Supreme City Magistrate.

Ditmar. Merseb. ap. Leibnit. Script. Brunce. I. p. 400. Many of the scattered authorities are collected in Curtius, l. c. §. 116. fin. 144, 149. 160. and Vendettini, l. c. p. 17.—20. 34. 105—107.

(149) Mur. antiq. It. T. 1. p. 194. sq.

(150) In Ravenna, A. C. 1138, "debent eligere communiter *tot Consules*" rel. Fant. IV. 260.—And, A. C. 1165, we find, in a Rimini-deed, nineteen Consuls. Fant. V. 292.

(151) In A. C. 949. "Petrus filio quondam Severus *Consul et neg.*" Fant. I. 127. See below, p. 273.

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are mentioned, in the greater part of the printed deeds, from Ravenna and other places of the Exarchate; although, the Decurions of Ravenna commonly bore that title, in the sixth century. Decurio, (152) or Curialis in the old sense never occurs; for, the latter title, in this period, decidedly signified the Exceptor of the Curia, and not a Decurion, as in the Theodosian Code. Now, the joint effect of all these circumstances establishes the probability of the Consuls and Decurions being the same. By this supposition, an intelligible employment is found for the Consuls, and their apparent omission in deeds is changed into a frequent reference. This statement of the meaning of the term Consul is, however, rendered altogether irresistible, by the following reasons. The Ravenna-Consuls are members of a deliberative assembly—Consilium, where they participate in the consultations and decrees. (153) In the

(152) See above, p. 329. seq. Decurions are, no doubt, mentioned, in a Roman edict of Otto I., A. C. 996, (Goldast Const. Imp. T. 1. p. 225. supr. Frankfort, 1673.) §. 3. Qui Magistratus *aut decuriones* potestate sua publica nimis libidinose utuntur .... restibus jugulentur." But, the authenticity of this Edict, and of many other parts of the collection, is extremely doubtful. [Struvius. Bibl. Jur. p. 654.]

(153) In A. C. 1181. "Audito etiam *consilio omnium Consulum* quod omnino fuit varium et contrarium." Fant. III. 56. and, likewise, in A. C. 1198—"potestas cum consilio et voluntate *totius consilii*," Fant. III. 64. In these

preamble of an epistle from Rome to Lothaire II., the Consuls are noticed, and the Senators omitted. (154) Moreover, the terms Senator and Consul are indiscriminately used in Rome, as if they had the same signification. (155) In the German cities of the middle ages, Consul is the common term for Decurion, Councillor, or Rathmann, (156) which simply and naturally arose from an imitation of the Italian cities. On any other supposition, it is difficult to conceive, how, amongst a people ignorant of the Latin language, a term should have been chosen, as the translation of Rathmann, which had never borne that meaning in any of the Latin countries. This explanation of the term Consul contradicts the improbable opinion espoused by Muratori,—of Consul, Dux and Patricius always denoting the same superior of-

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passages, *Consules* and *Consilium* have plainly the same signification.

(154) Baronius annal. eccles. ad A. C. 1130. Tom. xii. p. 195. Rom. 1607. [p. 192. A. Antverp. 1629, fol.] "Domino Lothario . . . Hugo praefectus urbis et frater ejus Leo Frajapanae . . . . et reliqui Romanae urbis potentes, sacrique palatii judices, *et nostri Consules*, et plebs omnis Romana salutem."

(155) Mur. Script. T. 3. P. 1. p. 381. B. "Multi Romani, *de Senatoribus ac Consulibus* aliqui."

(156) Ev. Otto diss. de consulibus qui extra Romam. C. 2. §. 11. in the collection of dissertations, p. 487. infr. Ed. 1723, 4to.

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ficer or commander. (157) These Consuls are first noticed, about the middle of the eighth century, (158) and occur without any interruption, from that period until the twelfth. Towards the end of that century, they disappear also in Ravenna; where, as in the Lombardic cities, the term Consul denoted a similar office with that of the old Duumvirs, or the highest municipal magistrate, who, unlike the proper Potestas, was chosen by the citizens themselves. (159)

The Pater Civitatis was the old Curaor or Quinquennal.

Pater Civitatis is often found in Ravennese deeds of the 10th, 11th and 12th centuries, although much less frequently than Consul. (160) The meaning of the term cannot be explained, from the instruments themselves; nevertheless, it retained its old signification, (161) and continued to denote the dignitary

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(157) Mur. annali d'Italia T. 4. p. 407.

(158) "Petivit Paulus *eminentissimus Consul* a Sergio Archiepiscopo." Fant. I. 15. Now, Sergius was Archbishop from A. C. 748 to 769. ibid. p. 407.

(159) Diploma of Henry VI. A. C. 1186. "Inde est quod nos *Potestati* Rav. tam praesenti quam omnibus futuris, *sive Consulibus qui ibi pro tempore fuerint* . . . praecipimus." Fant. II. 155. See for the following period Fant. V. 295. IV. 330. IV. 15. 16. (in the Statutes of the 13th and 14th centuries).

(160) The authorities may be easily discovered from the indexes in Fantuzzi. In the 13th century, names and surnames were derived from this office; thus, A. C. 1292, "Parcitade de Parcitadis." Fant. III. 155.

(161) See above, p. 336, and n. 113. 119. 120.

chosen by the citizens, who was the same with the old Curator or Quinquennal, but without jurisdiction.

The Judex or Dativus was the ordinary municipal Judge.

The most important among all the civil functionaries was the Judex or Dativus, found in Rome and the whole Exarchate, (162) where the two terms agree in their signification, and are either both applied to the same person, or used indiscriminately as synonymous. (163) Regarding these functionaries it is certain, that they possessed the com-

(162) Besides Ravennese Dativi, there are also—Dativi Sinogallienses, Faventini, de Carpineo, Ferrarienses, Ariminenses, Imolenses: Fant. I. 39. 253. 254. II. 14. 27. III. 18. V. 264. 268. The Dativi of all these passages are from Exarchate cities. The term Judex is ambiguous; for, while uniformly the same with Dativus in the Exarchate, it has quite a different meaning among the Lombards. [See below, n. 219] Dativi, out of the Exarchate and Rome, are mentioned only in a Placitum at Ravenna A. C. 996. "Antoninus *Dativus de Papia*" and "Berardus *Dativus de Milla*," (probably a place, on the river of that name, in the district of Bergamo), and both of these Dativi are, consequently, from truly Lombardic countries. Mur. ant. Estensi P. 1. p. 215. [p. 188. supr. ed. Modena, 1717. fol.] Fant. V. 263. The instrument was, however, prepared in Ravenna by a Tabellion of that city, where Dativus and Judex were synonymous. The Ravennese Tabellion might therefore easily commit the mistake of applying the title Dativus to persons, who were really not designated by that name in Pavia, &c., and who were in fact different from the proper Dativi of the old Byzantine Provinces. See below, n. 220.

(163) In Rome, A. C. 983, "taliter ab omnibus *Judicibus Dativis* sancitum . . . Benedictus *Datibus Judex*." Mur.

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mon and ordinary jurisdiction. The probability bestowed on this opinion, by the term Judex itself, rises into certainty, by the Dativi actually exercising the judicial functions in several deeds. (164) Some have maintained, that in these cases, a temporary and specially deputed power only must be understood; (165) which is, however, contradicted by the fact of Dativus being applied very frequently as a permanent title to individuals, even when not employed in their judicial capacities, e. g. to witnesses. This view is, indeed, completely established by those passages, in which mention is made of Dativi, among the other witnesses or judicators. Their names always occur towards the be-

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antiq. It. T. I. p. 381. C. 382. A.—Examples of their indiscriminate use occur in A. C.—996, Text, Andreas *Dativus;* and subscription, Andreas *Judice.*—967, Text, Stefanus *dat.;* and subscription, Stefanus *judex.*—990, Paulus *dativus*; and afterwards, Paulus filius *jam dicti Pauli judicis.*—1005, Text, Vitalis *Dativo* Imolensis; and subscription, Vitalis Consul *et Judex.* Fant. V. 263. 264. 268. 269. II. 27. 30. I. 218.

(164) The Dativus Andreas judged several Counts, A. C. 950; and, in a Court, A. C. 1005, the Dativus Vitalis of Imola appears, as the only presiding judge, and subscribes the instrument alone. Fant. IV. 176. V. 268.

(165) This explanation of Dativi is adopted by Ducange, v. Judex Dativus T. 3. p. 1571; and, by Mur. antiq. It. I. 492. infr., without any other reasons, than such as may be derived from the probable analogy of the name.

ginning, and often immediately after the imperial Missi, or the Bishops; thus giving them precedence, always of the Consuls and Tabellions and, not unfrequently, of the Duces also; (166)—a relation, in point of rank, which could only have arisen from their receiving the honours due to important public authorities.

The Dativus or Præfectus was appointed by the Emperor and the Pope.

The ordinary judicial business of each city having been thus discharged by the Dativi, it still remains to investigate the mode of their appointment. The name certainly implies, that they were nominated by the State, and not elected by the citizens, in accordance with the analogy of the expression—"tutor dativus," applied in later times exclusively to the Tutor, whom the public functionary had chosen. (167) This opinion is fur-

(166) Examples may be found in Fant. I. 218. 251. 253. II. 5. 27. 67. 70. III. 12. 17. IV. 198.

(167) See Brissonius and Vicat v. Dativus. In A. C. 838, Deusdedit, having attended a Court at Ravenna, is styled in the text of the deed—Dativus; and, among the subscriptions —"Deusdedit in Dei nomine *Prefectus*." Fant. II. 5. In the sixth and seventh centuries, Præfectus is sometimes still applied to the Exarch; and afterwards we meet with a Præfect of Amalphi, who must have been a Dativus, like the person just mentioned in the Ravenna-deed. Marini papiri, N. 132. p. 364. not. 13, 14. The passage, "Benedictus Domini nutu *Dativus Judex Sacri Palatii*," must be explained

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ther confirmed by the term Præfectus, which is used as synonymous with Dativus, and is ultimately placed beyond all doubt by the Judices, who are the same with the Dativi, deriving their appointment, in these very countries, from the general government. Pope Hadrian I. mentions in an epistle, A. C. 777, as a common event and as an ordinary branch of prerogative, that he and his predecessor had appointed the Ravenna-Judices. (168) In like manner, A. C. 783, it is stated, that some seditious persons in Ravenna had opposed the administration of justice by the Pope. (169) Likewise, in the Edicts of Lothaire I. and Otto I., A. C. 824 and 962, the Judices in the Roman territory are characterized as Magistrates and, at the same time, as officers of the Emperor and Pope. (170) The jurisdiction of the Dativus was limited to a city and its territory, as seems to be implied, by the ordinary addition of the name of the city. (171) In Ravenna and the larger cities there were several Dativi; and, in Rome, they had acquired, like the Tabel-

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in the same manner; although, with reference to a higher office, Marini papiri, N. 102. fin.

(168) Cod. Carol. N. 54. (Mur. Script. iii. P. ii. p. 206. D.) See above, p. 344. n. 130.

(169) Cod. Carol. N. 75. (ibid.) p. 235. E.

(170) See above, p. 347. n. 139. 140.

(171) See above, p. 357. n. 162.

lions, a sort of corporate constitution; (172) although, it must not be supposed from this, that they exercised the judicial functions in their collegiate capacity.

The Dativi, between A. C. 625 and 751, superseded the old Magistratus elected by the citizens.

From a comparison of this account of the Dativi, with the circumstance of the total omission of the old Magistratus and Defensors, in the numerous deeds from these countries, (173) the following important results may be deduced. The free principles in the municipal system had declined; and, while the right of the citizens to choose their own Magistrates had fallen into desuetude, others were appointed in their place by the general government, for the purpose, no doubt, of conducting the higher departments of municipal business, and principally—the administration of justice. The cities had now lost their own peculiar rights of jurisdiction. The Pater Civitatis, alone of all the authorities, was chosen by the people, but he was

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(172) Among the witnesses to a Roman deed of donation, A. C. 961, there is—"Georgius Dei providentia *Secundicerii Judicum.*" Marini papiri, N. 102. fin.

(173) The chronicle of Monte Casino, in the twelfth century, in the time of Lothaire II., speaks of a—Dictator Tusculanensium (Mur. Script. IV. 598. C.). At that period, however, Counts of Tusculum had long existed; and, the term Dictator is merely a learned mode of designating the Count. The Counts of Anjou were, in the same manner, called Consules. See above, p. 301. n. 53.

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without judicial power; and his appointment had long required the confirmation of the government. The newly substituted dignitary resembled both the old Rector of the province, and the Magistratus of the city. His likeness to the former consisted, in being appointed by the state, and to the latter, in having the extent of his jurisdiction similarly bounded. (173 a) By this innovation, all the cities, like the old Præfectures in the time of the free republic, continued, no doubt, to enjoy municipal constitutions, but became incapable of electing their judicial functionaries. The period, when this new and humiliating organization was introduced, is unknown. The title Dativus occurs first in a deed, A. C. 838. (174) Nevertheless, this notice may have been quite fortuitous, or the institution itself may have long existed, before it received that name: although, the nomination of the Judices by the Papal See, in the second half of the eighth century, is established by documentary proof. It is improbable, however, that the Pope, in this new and very unsettled part of his dominions, attempted great usurpations, or seized on rights, not belonging to his predecessors. On the contrary, the Dativi were, in all likelihood, long known in the Exarchate; and their nomination by the Pope was merely the

(173 a) See above, p. 336. n. 113. and p. 42.

(174) Part. II. 5.

continuance of a well established prerogative of the Exarch. Magistratus, in the old sense, having certainly existed, A. C. 625, their abrogation and the introduction of the Dativi must be placed, between that time and A. C. 751—the fall of the Exarchate. The want of precision, in the date of their establishment, is equally unavoidable in that of their disappearance. Indeed, the Dativi were certainly not abolished everywhere at the same time. They are found even in the thirteenth century, in a Roman deed; (175) although, all the cities of the Exarchate were, in the twelfth century, roused from their indifference by the example of those of Lombardy, and encouraged to commence the struggle for the recovery of their freedom. The Dativi necessarily ceased, when the right of choosing their own Magistrates became again the privilege of the citizens. Thus, in A. C. 1186, or five years after Ravenna was ruled by a proper Potestas, (176) that term had there changed its signification, and become synonymous with Consul, as in the cities of Lombardy. (177)

The now much subdivided powers of the Duces were of the same military character as formerly.

The third order consists of the Military Commanders—the Duces, Magistri Militum and Tribuni. The first occurs more frequent-

(175) In A. C. 1217, Mur. antiq. It. I. 493. A. See above, p. 335.

(176) Fant. T. 3. pref. p. xv.

(177) See above, p. 356. n. 159.

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ly in deeds than any other official persons. According to the common opinion, they were the governors of cities, and the highest civil and military functionaries. (178) The possession of military power is proved, both by the old signification of their title, and by their direct appointment, in later times, as commanders of the army. (179) The limitation of their authority, to a certain place, is also unquestionable; for, very often, express mention is made of a Dux of the city of Ravenna, Rimini, etc. Their civil power cannot, however, be reconciled with the above explained office of Dativus; and, even the supposition of their being military officers of very high rank is incompatible, with their numbers; for, they are designated as commanders not merely of cities, but of small rural districts. (180) On the

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(178) Muratori's opinion has been already noticed, p. 355. n. 157. In another passage, he avows his uncertainty of the true character of the Duces. Antiq. It. I. 162. A. 167. There is no foundation whatever for Vendettini's opinion of their being senators. Del Senato Romano, p. 48.

(179) A. C. 1115. "Petrus Dux Imperator Ravennatum exercitus instauraturus bellum adversus Ferrarienses," rel. Fant. II. 123.

(180) In a deed, A. C. 896, the situation of certain property is described as,—"Faventino *territorio et ducatu*;" afterwards,—*territorio* Livicense . . . *ducati Tra-*[illegible]nd, finally,—"Comitatu Comiaclo et *in territorio et ducatu eius*." Mur. ant. It. I. 153. infr.; and better given in Fant. I. 96.—Mur. l. c. p. 157. C., remarks, that Tra-

other hand, the jurisdiction of the Duces is equally undoubted. In the Roman territory, the Edicts of Lothaire I. and Otto I. describe the Duces and Judices, as regular members of the same judicial establishment; (181) and, since the language of this notice contradicts the opinion of the two offices being the same, we are almost compelled to believe in the extent and twofold nature of their functions. The particular character of the jurisdiction of the Duces may, however, with great probability, be explained by some of our preceding remarks, regarding the earlier institutions. To the soldiers and persons connected with the army, their jurisdiction was certainly limited; and, it may be remembered, that this distinction, which prevailed during the existence of the old empire, was not only confirmed by Justinian, but probably extended over all the Greeks indiscriminately. (181 a) The numbers of Duces mentioned in deeds,—the smallness of the Byzantine empire in Italy, and—the consequently diminutive size of the Ducati, afford no real objections to our view; for, while it is admitted, that there was no intrinsic necessity for such an extensive subdivision, still, the

versaria never was a city, but only a Villa in the Ferrara territory.

(181) See above, p. 347. n. 139.

(181 a) See above, p. 324.

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passion for titles in these inglorious times, and the policy of the government to weaken this military power by partition, are sufficient to explain their abundance. Besides, it is certain, that most of the Duces were very little occupied with their official duties. This account of the original nature of the Ducal office explains, easily and simply, from the former constitution, the causes both of its origin and subsequent abuse. A confirmation of our opinion is also found in the descriptions of the Duces, during the earlier times of the Greek supremacy; although, from the misapprehension of these very notices have flowed all the errors, still current on this subject, among the moderns. The Ducal functions were not lowered by Gregory the Great, between A. C. 590—604, in consequence either of the numbers on whom they were bestowed, or of local restrictions. Their authority extended over whole districts,—such as, Sardinia and Campania, or over the larger cities and their territories—such as, Naples and Rimini. (182) Gregory's epistle to the latter city bears the address, "Gregorius Arsicino Duci, clero, ordini, et plebi Ariminensis civitatis." Here, indeed, the Dux is placed at the head of the whole public functionaries; but this is mere vague compliment

(182) Gregorii M. epistolae, Lib. 1. ep. 58. IV. 24. X. 11. XII. 18. XIV. 10.

and honourable distinction; since, at this period, all the Greek cities chose their own Magistratus, for the whole civil administration. (182 a) These, however, were included in the—Ordo or Curia; and the Dux's position, above the other public authorities, refers merely to his rank, as the only Imperial officer within the city, and not to the intrinsic dignity of his office, or to the substantial importance of his functions. In the same manner, we must explain the Ducatus of Rome. This term is commonly understood to mean—the whole remaining territory under the Greeks, of which the city of Rome was the centre. And this explanation is accurate; for, during the Popedom of Zacharias, between A. C. 742 and 752, it included the cities of Ameria, Horta, Polimartium and Blera; and the same authority refers to a Roman army, and to a treaty of peace with the Roman Ducatus. (183) The supporters of this opinion, however, are mistaken, when they place this Ducatus under the controul of a Dux, subordinate indeed to the Exarch, but with similarly united civil and military powers. (184)

(182 a) See above, p. 335.

(183) Anastasii vita Zachariae P. ap. Mur. Script. III. P. 1. p. 161. D. 162. "ab eodem Rege ablatae sunt *a Romano ducatu* civitates quatuor, id est Ameria, Hortas, Polimartium et Blera."

(184) This is the prevailing opinion. See Beretta in Mur.

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The error here has plainly arisen from the analogy of the German Counts; who, under the most different titles, uniformly possessed the twofold functions: while, in the Exarchate, such a union was at variance with the whole public system. The above explanation of the Roman Ducatus is therefore admissible only under the following limitations;—that no civil power be ascribed to the office of Dux, and—that due care be taken in fixing the period, when even this character of the Roman Ducatus ceased to be applicable. Such was its unquestionable state, about the middle of the eighth century; but, the number of Duces found afterwards in this district compels us to believe, that, perhaps from the ninth century, the former single Ducatus had been subdivided into many Ducati, as happened in the kindred constitutions of the proper Exarchate and Pentapolis.

The Magister Militum had no local command.

The terms,—Magister Militum and Tribunus denote military officers, without any local command; and, while both enjoyed situations and rank in the army, the first was the su-

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Script. T. 10. p. CCXVI. and Spittler Staatengeschichte, Th. 2. S. 84.—Nevertheless, Beretta himself feels the difficulty, which arises from the continuance of the Præfectus urbi, and limits the common opinion, accordingly, by that ex- cxvi. infr.) The Dux is thus said to have possess- ical, and not civil power; i. e. no jurisdiction.

perior officer. (185) The appearance of a Magister Militum in certain cities, such as Rome, Naples, Ravenna, Rimini, Sinigaglia, and Angers in Gaul, admits of an easy explanation. (186) The Dux in any of these might also hold the situation and rank of Magister Militum in the army, and be designated by either title, even in matters relative to his Ducatus. This was the cause—why, in the same city, sometimes a Magister Militum, and at other times a Dux is mentioned, and—why the former appellative occurs much less frequently than the latter. The accuracy of this explanation is proved by an epistle of Gregory the Great, in which mention is made of two Magistri Militum, both of whom were, at the same time, Duces

(185) Danduli Chron. Venet. ad. A. C. 737. (Mur. Script. T. 12. p. 136. E.) Dominicus Leo Magister Militum præsidere cœpit a. dom. 737 quia Veneti .... annualem Rectorem sibi præesse statuerunt, quem *Magistrum Militum* appellaverunt. Quae quidem dignitas *secundum Graecorum usum Tribunatu major*, super eos et cunctum Populum potestatem praebet.

(186) In Rome, under Louis le Debonnaire, according to the Chronicle of Farfa, in Mur. Script. T. II. P. 1. p. 643. —In Naples, Mur. ant. Ital. T. 1. p. 194. D.—In Ravenna and Rimini frequently, as in Fantuzzi's Deeds.—In Sinigaglia, about the middle of the eighth century. Fant. I. 35. See above, p. 301.

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of Sardinia. (187) The relation between Dux and Magister Militum was consequently the same as, in earlier times, between Dux and Comes; (187 a) and it is very remarkable, that the latter designation, so common in the old Empire, entirely disappeared, under the new supremacy of the Greeks in Italy. To this they were probably led, by contempt for their Barbarian predecessors and neighbours the East Goths, Franks, etc. among whom that term had been naturalized. In addition to the instances already given, Magistri Militum very frequently occur in the epistles of Gregory the Great, (188) and in Ravenna-deeds, if not of the sixth, at least of the seventh century; (189)—and, from that time, onwards to the second half of the eleventh. (190)

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(187) Gregorii M. epist. Lib. 1. ep. 49. D.—"Theodorum gloriosum Magistrum Militum, qui ducatum Sardiniae insulae suscepisse dignoscitur;" and, afterwards,—"Edaacium Magistrum Militum, jam per Indictionem septimam tunc ducem Sardiniae."

(187 a) See above, p. 82.

(188) Ep. I. 76. II. 3. 29. 30. VIII. 17. 19. IX. 69. 73. 93. X. 27. XII. 19. 20. 26. See above, n. 186.

(189) Marini papiri N. 90. lin. 31. N. 94. lin. 11.—The first notice of the Magistri Militum in Fantuzzi is about A. C. 700, under the Archbishop Damianus (I. 11. compared with I. 407.)

(190) A. C. 1055 "Andreas Magister Militum." (Fant. I. 285) A. C. 1067. "Signum ma † nus Divito rog. cumque scribere nesis Magister Militum." And in the notitia

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The Tribuni also were Military officers.

The Tribuni are of still more frequent occurrence than the Magistri Militum, and are exclusively military officers, occupying situations in the army, under the latter. Such is their character in the—Notitia Dignitatum, Chronicle of Dandolo, Epistles of Gregory the Great, Imperial Constitutions, (191) and Instruments of the eighth century. (192) Their frequent connexion with a particular city admits of the same explanation as was formerly applied to the Magistri Militum in these situations. (193) They are

testium at the end of the deed "Divito Ariminensis." Fant. I. 296. See below, p. 375.

(191) See above, n. 185. Gregorii M. epist. Lib. 2 ep. 31.—Nov. Theodosii Tit. 14 Const. 3. [Lib. 1. Tit. IX. Const. 3. fin. Jus Civ. Antejust. Præf. Hugo. p. 1238. Berol. 1815, 8vo.] "Tribuni Militares." "Tribuni qui numeros agunt." Several other public officers bore the same title.

(192) A Ravenna-subscription, A. C. 767, runs—"Constantinus *tribunus numerum Lenon.*" Mur. ant. It. III. 92. B. Fant. II. 4. Instead of Lenon, it has been proposed to read Veron, by Marini papiri p. 325. not. 1. fin. and Fant. II. 486. But Leon. is a much better and simpler emendation: for, according to the notitia dignitatum, (p. 72, ed. Labbe, Paris, 1651, 12mo), the Leones juniores were at one period stationed in Italy, and their title might easily be preserved by mere usage. Marini papiri N. 111. lin. 5. (cf. p. 327. not. 3.) "Petrus ex Trib. Num. jun." Many of the authorities, on the military constitution of this period, may be found in Marini, l. c. p. 297. not. 10. p. 325. not. 1.

(193) Gregorii M. epist. Lib. 2. ep. 31.—Fant. I. 6. 7. 8. 9. 10. 13.—Marini N. 127. lin. 44. Perhaps, an

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found no more in deeds, after the tenth century.

Municipal freedom had declined.

The essentials of the system, which we have been thus examining in detail, may be now briefly enumerated. Of the municipal system, the Curia still remained; while, the Pater Civitatis, a solitary magistrate elected by the citizens, was the only memorial of their former rights. The Defensors and Magistratus had disappeared. The effective public officers were appointed at first, by the Exarch and, afterwards, by the Pope; but the civil and military functions still continued separate. (193 a) The administration of justice was regulated, by this distinction; for the Duces, and the Dativi or Judices had each their separate departments of judicial duties; although, it is remarkable, that

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expression in the Cod. Carol. N. 51. (Mur. p. 201. D.) ought to be similarly interpreted. "Nam et de aliis civitatibus Emiliae, id est Faventia .... et Bobio, *seu Tribunatu decimo.*"

(193 a) This opinion is not at variance with the fact, that in later times and long after the fall of the Exarchate, the people of Naples chose their Dux or Magister Militum. Sismondi, T. 1. Chap. 4. p. 244. seq. [p. 222. supr. Paris, 1826, 8vo.] This happened at a period when the few cities, remaining under the Greeks in Lower Italy, had regained a sort of independence from the weakness of their conquerors. Least of all, does this fact contradict the above mentioned (p. 361) abolition of the right of the cities to choose their own Magistrates; because, the Duces had no civil jurisdiction, and bore consequently no resemblance to the old Magistratus.

in these different classes, several offices and employments might be united. Most frequently Consul and Dux, or Consul and Tabellio occur together. The Consul is not often a Dativus, or Judex, or Pater Civitatis, or Tribunus at the same time. The Dux is sometimes called Dativus, and, in these rare cases, possessed both kinds of jurisdiction. (194) Tabellio et Dativus, and Tribunus et Dativus, are seldom conjoined. Several of these offices appear to have become, in a certain degree, hereditary. Thus, it is remarked of many persons, that they are descended from a family of Consuls, Duces, or Magistri Militum; (195) while none are ever traced to a Dativus, Pater Civitatis, or Tribunus. Such notices of descent may be merely accidental, and may not imply the hereditary nature of the offices themselves; although, the latter appears to be the most probable; both because the absence of all

(194) Fant. I. 101. 116. 117.

(195) A. C. 877. "Farualdus filius Paulus *ex genere Duci Atque Ducx.*" (Fant. I. 197.) A. C. 973. "Andreas *ex genere Magistri Militum.*" (Fant. I. 185)—A. C. 983. "Paulus . . diaconus *ex genere ducum* . . . . Johannes et Amelricus, seu Randongus *genere ducibus*, Rodaldus et Andreas *gener magistri militibus* . . . . Johannes paterius, et Johannes *genere consulibus.*" (Fant. I. 213) A. C. 1291. "Uxor Joannis *Ducis de Domo Ducum.*" (Fant. II. 237.)

CHAP. V. §. 7.

similar connection with the other offices implies their temporary nature, since such a uniform omission is quite impossible, if mere fortuitous ancestry had been the basis of the distinction; and because the Consuls are the old Decurions, whose offices were decidedly hereditary from the earliest times. (195 a) The heritable nature of these appointments, however, fixed only the character of the family as a whole, and did not imply that all its members were actually Duces, Consuls, etc. Indeed the supposition, that the office of Dux might in some instances be connected with land, does not appear improbable: At least in a lawsuit, about the property of a Ducatus, A. C. 1197, the whole circumstances clearly prove the object of contention to have been an ordinary estate. (196) The system, here explained, commenced under the Greeks;

(195 a) See above, p. 27.

(196) Fant. iii. 61—64, (from Mur. Antiq. It. T. 1. p. 159.) That the land and office had not been granted in feu together is proved, by the question at issue having been—whether the estate was held in free property, feu, or Emphyteuse; while, the parties and witnesses are unanimously agreed about its character as a Ducatus; e. g. "*Duces* habere et tenere *Ducatum.*" (Mur. p. 159. A.) Both the definition of its boundaries (ibid. p. 160. D.), and the statements of the witnesses—"quod *Ducatus* est *de plebe Sancti Viti;*" (ibid. p. 160. A.) i. e. part of a parish, prove, that the disputed subject was a mere estate, and not a district.

(196 a) and, its examination was reserved for the present section, merely because the documentary evidence in support of it belongs almost exclusively to these latter times. The peculiarities of this constitution disappeared, after the full establishment of freedom in the Lombardic cities; for, the desire of imitating their policy seized even the Ravennese and Romans.

The Statutes of Tivoli describe its Constitution.

The statutes of Tivoli must be of more recent date than A. C. 1257, when the city became subject to the Roman Senate. They were probably composed soon after that event, and only altered on particular points, in A. C. 1305. From them we gather the following account of the Constitution. The head of the old republic, even after its subjugation, was the Caput Militiae,—the old Magister Militum. (196 b) His duties were—to assemble the council—to lay before them the business for which they were called together—to control the finances; and—to compel obedience by fines, etc. The Sedialis was the Judge in the first instance; and, from him, an appeal lay to the Caput Militiae. After the Conquest, Rome sent a Comes, every six months, who resembled, in all respects, the Podesta of

(196 a) See above, p. 340.

(196 b) See above, p. 369.

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the other cities; excepting,—that he possessed concurrent jurisdiction with the Sedialis, and—that an appeal lay from him also to the Caput Militiae. The principal corporations were those of the Judices and Tabellions. That the Caput Militiae was here also chosen by the citizens, may be explained, from what has been already said, regarding the other cities. (196 c)

The German settlers lived under their own laws.

It still remains to examine the condition of the German settlers, in the Roman and Exarchate countries. These were, and continued to be, foreigners. On account of the smallness of their number, a complete amalgamation may have been longer of taking place, than in many of the Lombardic cities; but, after the Saxon Emperors, the Germans enjoyed their native or personal law. In Ravenna, during the ninth, tenth and eleventh centuries, Professiones of the Frank and Lombardic laws sometimes, although rarely, occur: (197) and, in Rome, it was ordained,

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(196 c) This notice was communicated by Niebuhr. The statutes consist of five books;—public law,—forms of process,—criminal law; and,—police regulations in the two last. They are now very rare, since 100 copies only were printed in A. C. 1522. See above, p. 372. n. (193 a)

(197) Fant. i. 38. 59. 101. 105. 277. In Sinigaglia, A. C. 1155, there are two professiones of the Roman Law.

A. C. 824, that the whole inhabitants should be required to declare, under what law they wished to live. The Scabini, (198) occasionally mentioned in Ravenna, belonged to the foreign inhabitants only; and, it must not be supposed, that the proper constitution of the city underwent any Lombardic or Frank transformation. From the Scholæ of foreigners in Rome, at the end of the eighth century, and in Ravenna during the sixth, the Germans seem to have been regulated among themselves, by separate corporation laws. (199)

SECTION VIII.

UNDER THE LOMBARDS.

The Roman influence survived the Lombardic conquest.

BEFORE commencing the inquiry, concerning the Civil institutions of the Romans in the Lombardic Empire, we must previously,

(Fant. II. 270. 271.): a proof, that many Lombards had settled there.

(198) See above, p. 142. A. C. 896, "tibi Gumberto *Scavino*. Fant. I. 98. We also find, in a deed of uncertain date, a Scavino and a Castaldio in Ravenna. Marini papiri, N. 126. lin. 25. 26.

(199) See above, p. 325. n. 94.

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as in the other German kingdoms, examine the personal fate of the vanquished, and the effects of the conquest on their landed property. If the Romans were either altogether destroyed, reduced to bondage, or stript of their estates, the preservation of their civil institutions becomes impossible; but if, on the other hand, their lives, their personal freedom, and the greatest part of their property were respected and preserved, then the continuance of their internal policy may be anticipated; although, even in that case, other causes may have produced its subversion. On this subject, two authors have maintained, with much zeal and acuteness, most opposite opinions. Maffei argues, that only a few Lombards settled in Italy, and that the old race remained, for the most part, pure and unmolested; as may be seen in the modern population of the country. (200) According to Lupi, the old nation was totally destroyed; and the present Italians are Lombards, with a small admixture of Romans. (201) Both accounts are exaggerated. Maffei overlooks the undeniably great change which took

(200) Maffei Verona illustrata (ed. Verona, 1732, 8vo.) P. 1. lib. II. p. 584. sq.

(201) Lupi Codex diplom. Bergom. Diss. 2.

place, in the whole condition of the nation and country; and forgets, that the Lombard invaders, although at first few in number in proportion to the country over which they spread, must have rapidly increased in their new and improved situation. Lupi, again, has observed too exclusively the condition of Bergamo—the city of his birth. He found there in deeds, almost exclusively Lombardic, and scarcely any Roman institutions. But, it is quite conceivable, that desolation and downfal might accidentally be the fate of one city more than of another; and, that the countries nearest the invading barbarians would be, in the most perilous condition. Maffei has, unquestionably, kept nearer the truth than his antagonist; because, the preponderance of Roman elements in the Italian language is a decisive proof, that a very considerable portion of the old nation was preserved. (202) The accurate part of Lupi's opinion appears to consist in maintaining, that destruction would certainly overtake the great and the wealthy among the Romans, before it reached the vulgar.

The Lombards took a third of the produce of the Roman Estates.

The fate of the landed property after the conquest cannot be understood, without noticing some of the preceding occurrences.

(202) Maffei, l. c. p. 589, sq.—Gibbon. Chap. 45. (VIII. 148. Lond. 1802, 8vo. or V. 440. Lond. 1825, 8vo.)

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Odoacer took a third, and the East Goths merely occupied the places of the Heruli. (202 a) All these arrangements ceased, under Justinian. Thus matters stood, at the time of the invasion by the Lombards; and their national historian details the subsequent procedure, in two passages,—both referring to a period within twenty years after the conquest, and well deserving an attentive perusal. The first narrative applies to the period following the death of King Cleph:—" his diebus multi nobilium Romanorum ob cupiditatem interfecti sunt; reliqui vero per hospites (al. hostes) divisi, ut tertiam partem suarum frugum Langobardis persolverent, tributarii efficiuntur." (203) Now, it may be remembered, that Hospes is the technical term for one of the relations produced by the allotment of the land; and, that among the other German nations, the estate of each Roman was assigned to a German, and divided with him. Keeping in view these facts, the whole passage is clear. Each Roman was obliged to give up a third of the produce of his estate; and was, for that purpose, assigned to a particular Lombard, as his Hospes. Thus, all the Romans

(202 a) See above, p. 316. seq.

(203) Paulus Diaconus, Lib. 2. C. 32. (Mur. Script. T.1. P. 1. p. 436. D.) See above, p. 281.

were partitioned among the Lombards;— not to be their slaves, but to pay them the above mentioned tribute. In the second passage Paul speaks of Autharis, who had been chosen king, after an interregnum of some years. To support the royal dignity, the whole Duces gave him the half of their property:—a becoming grant, from those who had undoubtedly seized the wealth of his predecessor. "Populi tamen aggravati per Langobardos hospites partiuntur. Erat sane hoc mirabile in regno Langobardorum: nulla erat violentia: nullae struebantur insidiae: nemo aliquem injuste angariabat: nemo spoliabat: non erant furta: non latrocinia: unusquisque quo libebat, securus sine timore pergebat." (204) From this statement it appears, that while the king was endowed by the great, the Romans were partitioned among the individual Lombards, as their Hospites: (204 a) not in consequence of any new allotment, but only in virtue of the system explained in the preceding quotation, as is proved by the similarity of the expres-

(204) Paul. Diac. iii. 16. (al. 15.) (ibid. p. 444. B.)

(204 a) A Communio pro indiviso might perhaps have existed among the Lombards, if it could be discovered in the tribute of a quota of the produce: which, however, can be maintained only in a figurative sense.—See above, p. 279. n. (9 a)

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sions. That the state of the country is afterwards described, as orderly and peaceable, does not contradict this explanation: for, the tribute was not the arbitrary oppression of a few arrogant Lombards, but the application of a general and uniform principle, to which, although differently modified, the Romans, when under the Heruli and Goths, had been long accustomed. While the Goths, therefore, took their third in land only, (204 b) the Lombards levied their share in produce, a much simpler and easier procedure, and better adapted to the barbarous state of their civil institutions. By the first passage, each Roman was deprived of a third of the produce of his land; and, this was not the restoration of the Gothic system, but an entirely new arrangement, both in form and substance: for, there are no authorities to prove, that the Goths ever took any surrogate of produce or money, in lieu of the natural third of the land itself. The Lombardic exaction was also much

(204 b) See above p. 316. That the Romans did not lose their landed property when under the Lombards is proved, by a Narrative in Paulus Diac. V. 28: (ibid p. 484. B) according to which, the Romans of Opitergium were, upon a particular occasion and as a punishment, deprived of their estates by Grimoald. This happened long after the Conquest; They must, consequently, have possessed their lands during the interval.

higher than the Gothic. These increased burdens, however, were equalized to the Romans, by the relinquishment of the land-tax: and thus, notwithstanding the anxiety of the East Goths to endow the state, and that of the Lombards to enrich themselves, the burdens on the vanquished probably continued in practice almost the same. The difference in the plan, pursued by the two nations, naturally arose, from the comparative simplicity of the Lombardic government, when contrasted with the pomp and splendour of the East Gothic monarchy. Nor will this dissimilarity appear in the least degree surprising, when it is considered,—that the power and dignity of the Lombardic elective king were much inferior to thoe of Theodoric, and—that the whole government of the Lombards was of a less complicated kind, than the systematic policy of the Goths. If this be the accurate explanation, many individual Romans may indeed have lost their fortunes, in consequence of the invasion; but those, who escaped the first fury of the storm, preserved their property and became tributaries for a certain sum. Their situation was certainly not worse, and perhaps better, than under the Goths; who, while they preserved the whole civil institutions of the Roman empire, retained also the old taxes, in addition to their third of

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the land. Indeed, it was scarcely possible, in any other way, to have provided for the expenses of their complicated administration, and satisfied the claims of the Gothic and Roman great men, both of whom it was always an object to gratify. But the Lombards found these circumstances altogether changed. In the wars between the Goths and Grecks, the principal Romans had been almost annihilated, and lost an importance never afterwards to be regained. By abandoning the higher branches of the Roman internal policy, the proper expenses of the Lombardic government must have been much diminished. The desires of individual Lombards were also richly satisfied by the vacated land of the slain Romans, and by the already noticed tribute of a third. Thus, scarcely a pretence existed for perpetuating the old Roman taxation. About the middle of the seventh century, in the laws of King Rotharis, no mention is made of the tribute of a third of the produce; and Gibbon concludes, that, "either the Roman landlord was expelled by his strong and insolent guest; or the annual payment of a third of the produce was exchanged, by a more equitable transaction, for an adequate proportion of the landed property." (205) The first could never have happened

(205) Gibbon, l. c. p. 150. or V. 442. Lond. 1825, 8vo.

in a period of acknowledged possession, when it did not occur even during the first violence of the conquest. The second, however, is very possible, and might have been occasioned, by the Lombards becoming gradually reconciled to fixed abodes and peaceful occupations. (205 a) Still, the omission in the laws of Rotharis is not of itself sufficient to prove, that the tribute had been really discontinued; since conclusions, founded on the mere silence of the German legislators are always particularly uncertain.

Lupi, Fumagalli, Spittler and Sismondi mistake the condition of the Romans.

This opinion, concerning the landed property of the Romans under the Lombardic dominion, is at variance with the doctrines of preceding authors. Lupi and Fumagalli maintain, that the Romans lost absolutely all rights of property, even in their dwelling-houses. For the purposes of providing them with habitations, and preventing plots by separation and strict superintendence, the vanquished are also said to have been alloted and quartered among the vic-

(205 a) In particular cases, there may have been a real division of the land, as seems to be implied by the following passage, from a Bergamo-deed, A. C. 948; (Lupi T. 2. p. 211)—"susciperet de rebus suis *de sua sorte* pecia una." A similar expression occurs, in an earlier deed of the same volume. Perhaps, however, both have originated in the careless use of a general term.

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tors. The supporters of this very singular theory found upon a literal interpretation of the words " per hospites divisi," in the first passage already quoted, (206) forgetting—that hospes, in the laws of the other German tribes, has quite a different signification, and —that it must be referred to the Lombardic tribute of a third, mentioned in the same sentence. Spittler supposes, that there was a sort of twofold division of the land: the first, affecting the rights of property, was perfectly arbitrary and, from that very circumstance, the more oppressive: while the second merely imposed the tribute in produce upon the estates which had escaped the first. (207) These alleged extortions may indeed have happened to many Romans, during the first years of confusion; but, Spittler's error consists in—drawing too general conclusions from such special cases, and—considering the first division as instituted for the benefit and maintenance of the Lombardic nation; while, it is certain that the thirds of the produce

(206) See above, p. 380. Lupi l. c. p. 123—125. 175. Fumagalli antichità Longobardico-Milanesi, T. i. p. 13. 106. The second passage of Paulus Diac. is explained—by Lupi, as repealing the alleged system of quartering the Romans among the Lombards;—and by Fumagalli, as extending the taxes over the Lombards also. Both suppositions are equally forced and unfounded.

(207) Spittler Statengeschichte, Th. 2. S. 47.

were the only revenues set apart for that purpose. Finally, Sismondi surpasses all his predecessors, in simplicity of doctrine. The Romans were—stript of their estates—reduced to a kind of bondage—divided along with the land like droves of slaves and —treated, in short, after the Spanish fashion, as displayed in their conquests of Mexico and Peru. (208)

Sigonius, Maffei, Muratori, Lupi, Fumagalli, Sismondi and Spittler err, in maintaining the overturn of municipal freedom.

The victorious Lombards having thus left the vanquished in possession of their estates and liberties, the question arises: whether, these personally free Romans were allowed to enjoy any part of their former constitution; and, particularly, their judicial system? While the higher branches of the Roman policy totally disappeared, were the internal institutions of the cities, which existed entire at the period of the Lombardic conquest, (208 a) also swept away? It is scarcely possible to separate this investigation from the kindred inquiry, concerning the origin of

(208) Sismondi, (T. 1. p. 76. 77. 79, or p. 60. seq. Paris, 1826, 8vo) is misled by referring the expression "per hospites divisi;" to rights of property over the person. It is surprising, that the "divisi," and the "partiuntur" of Paulus Diaconus have not been explained, by the well known passage in the Twelve Tables,—"partes secanto; si plus minusve secuerunt, se fraude esto"! In Mexico, even worse deeds were perpetrated.

(208 a) See above, p. 339.

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the celebrated republics of the twelfth century: for, a disbelief in the alleged overturn of Civic independence by the Lombards necessarily leads to a denial of its subsequent restoration: and, those who maintain, that the Roman institutions were utterly destroyed by the Lombardic conquest, must also be prepared to consider the freedom of later times, as usurped, and not as the continuance and development of rights, venerable from their antiquity. This comparatively modern origin of Civic independence has been generally adopted, both in Italy and other countries. Sigonius, tacitly assuming the total downfal of municipal freedom, prefers, although with much hesitation, the reign of Otto I. A. C. 951–973, to that of Henry IV., as the date of its revival, and thus traces the origin of the new Republics to a period, within the limits of our present investigation. (209) According to the opinions of Maffei, the Greeks had already destroyed all the municipal institutions; and, on this supposition, the Lombards could hardly have restored them. Muratori admits the overturn of the city-establishments by the Lombards; and dates, from A. C. 1000, the commencement of a perfectly new independence, in which he has been followed by most mo-

(209) See below, chap. XIX. Text to n. 56. Sigonius in hist. Bonon. lib. 2. init. et ad a. c. 1076, (opp. T. 3. p. 62. B. 73. Mediol. 1733, fol.) See above, p. 340. n. 121.

dern writers. (210) Nevertheless, according to this author's custom of darkening and weakening every opinion, by the addition of opposite doctrines, many contrary arguments are subsequently adduced, and the whole question is left undecided. Muratori's weightiest objections to his own theory are the following. The election of Scabini by the people, according to the Lombardic laws of Lothaire, gives rise to the first hesitation; but, this was undoubtedly a part of the German district-constitution—gauverfassung, and not of the proper Roman municipal policy; although, the appearance of City-Scabini in subsequent times must be considered, as the result of the gradual amalgamation of the two systems, or of the Lombardic inhabitants with the old Roman citizens. (210 a) Secondly, the participation of the people in the election of their bishops perplexes Muratori. No sound conclusion, however, can be drawn, regarding the constitution of the cities, from that of the church; and the Romans might, without prejudice to this right of election, be entirely governed by Lombardic authorities. The occurrence of a municipal Ordo among the Lombards, a third

(210) Mur. ant. It. T. 1. Diss. 18. particularly p. 983. 984. 1007. C. sq. and T. 4. Diss. 45. p. 5. [Hallam, Middle Ages, i. 296. 338. Lond. 1828, 8vo, follows Muratori.]

(210 a) [See above, p. 171. 277. Rogge. Gerichtow. der Germ. ii. Cap.]

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source of Muratori's doubts, and to which he does not attach sufficient importance, shall be afterwards examined. (211) According to Lupi, the Lombards destroyed the whole municipal system; and, after the lapse of many years, the Lombardic inhabitants of the cities began to form themselves into communities, under aristocratic senates. From these, the later republics probably originated. (212) Fumagalli asserts, that in all likelihood none of the Civic communities existed under the Lombardic supremacy, and leaves it undetermined whether the magistrates might not have been chosen also from the Romans. (213) Sismondi maintains the total overturn of the constitution, and its subsequent restoration under Otto I. There were, consequently, in Pisa and the other cities, during the tenth century, not merely the first symptoms of rising freedom, but its full development, in all the maturity of the twelfth

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(211) Muratori is most unaccountably timid regarding the signification of the term—Ordo, (Ant. It. T. 1. p. 1009 B.); and erroneously supposes, that Gregory the Great used that expression in Epistles to the Greek cities only, and not to those of Lombardy. See below, p. 397. n. 221.

(212) Lupi cod. dipl. Bergom. p. 133. 134. 563.

(213) Fumagalli antichità Longob. Milanesi, Vol. i. p. 105. In support of the last statement, he quotes Gius. Rovelli Storia di Como, P. 1. Diss. prelim. p. 136,—of which we have not been able to procure a copy.

—with Consuls—other elected magistrates—artificial subdivisions of power and—even independent legislation! (214) Spittler, also, believes in the total subversion of municipal freedom, by the Lombards. (215)

No material change took place, under Otto I.

No evidence whatever exists to prove, that any great change took place, either under Otto I., or his immediate successors. The new and improved form of constitution first appears at the end of the eleventh century, and even then, only by the indistinct outlines of a feeble commencement. Any change of condition, from the beginning of the Lombardic dominion until towards A. C. 1100, rests merely on ill-founded conjecture: and the same condition of freedom, or of dependence, must therefore have endured throughout the interval. Our reasons shall be immediately given in support of the former supposition, that freedom survived the darkness of the intervening period—a freedom, no doubt,

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(214) Sismondi, T. i., p. 113. 117. 118. 332. 351. (or p. 95. 99. 100. 371. seq. Paris, 1826, 8vo.) The principal proof, in support of this opinion, is the assertion of Sigonius; but Sigonius is not an original authority; and he only recommends that date as probable, without positively asserting its truth. See above, p. 388.

(215) Spittler Staatengeschichte, Th. 2. S. 46. 47. "The municipal institutions of the cities, which had been hitherto preserved both under the Gothic and Greek supremacy, were at once universally abolished."

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barren in immediate results, and hallowed by no glorious achievements, and rather reserving its blessings for an improved posterity, than dispensing them on its ancient votaries.

The example of the East Goths led to the preservation of the Roman Civic Institutions.

The analogy of events among the other German conquerors furnishes the first reason. Since the constitution of the cities remained entire in the Burgundian, West-Gothic, and Frankish states, the same may have happened among the Lombards, whose national institutions contain no trace of a previously arranged and steadily executed public system. If the absence of such a policy naturally conducts to the supposition, that they would be influenced and guided, by the recent example of their immediate German predecessors, the continuance of civic independence will be confirmed, by the East Goths having, more than any other German nation, respected and preserved in vigour the institutions of Rome.

Which are also proved to have continued, by the resemblance between them and the new Republics.

A second argument is derived from the Republics of the twelfth century. It is scarcely possible to believe, that these copies of the Roman municipia, were merely subsequent usurpations; and, an acquaintance with all the circumstances rather increases the difficulty. Between the periods of the old Municipia and the new Republics, the Civic institutions must have ceased, during full five hundred years. Tradition

could not preserve from this remote period, any accurate recollection of a system so long abolished, or any remembrance, sufficiently general and deep, to have possessed a practical influence over the people. Still less, could such effects be produced in those times, by the influence of ancient literature. The example of the cities in the neighbouring Exarchate might perhaps be supposed, to have led the Lombards to imitate and introduce their constitutions. Nevertheless, a principal part of the independence of the citizens, viz. their particular courts under magistrates appointed by themselves, had entirely ceased in the Exarchate some centuries before. (215 a) This source of imitation cannot, therefore, account for the origin of the new republics. On the other hand, let it be supposed, that the Roman Municipia were never abolished, and that the twelfth century only ushered in the revival of old, but never interrupted forms, and the difficulty, otherwise insurmountable, immediately disappears. If this be true, the preservation of every memorial, even from the earliest times, may easily be explained. Such recollections might live among the Decurions, however fallen from their original greatness; whereas, every record must have perish-

(215 a) See above, p. 361. and below, Chap. XX. Text to n. 3.

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ed with the ruin of the constitutions themselves; since, no firm point remained, upon which tradition could rest. On this subject, there is an authority, from the middle of the twelfth century, in the highest degree worthy of attention. The Lombardic Republics are expressly stated to have imitated the old Roman municipal institutions: (216) and the comparison employed does not refer to a condition, long abrogated and only to be learned from books, but to a system in perfect preservation and actual efficiency.

By the preservation of Roman Law.

A third reason, for maintaining the endurance of the municipal institutions, is afforded by the admitted preservation of the Roman law; which could hardly have continued, if the whole judicial system of the Romans had perished. (216 a) This view is supported by all those Placita, in which any of the classes of Judicators are styled—Roman Judices, or synonymously—Judices Civitatis; for, these expressions denoted, at first, the Decurions of the Roman city alone. (217) That they were afterwards employed

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(216) Otto Frisingensis, Lib. 2. C. 13. (Mur. Script. T. 6. p. 708. E.) "In civitatum quoque dispositione, ac reipublicae conservatione, *antiquorum adhuc Romanorum imitantur solertiam.*"

(216 a) See above, p. 274.

(217) On this subject, and the later—"Collegio de Giudici," see above, p. 277.

with reference to the new community of amalgamated Romans and Lombards, is unquestionably true. On such occasions, however, Scabinus was the proper phraseology, even in the cities of Italy; although, not unfrequently, Judex and Scabinus were there used, as synonymous. (218) The expressions —Judices Civitatis or Romanorum, occur very often in Lombardic deeds, either simply without any addition, or what is quite decisive, along with other classes of Judices and carefully distinguished from them. (219) Never-

(218) Placitum at Cremona, A. C. 842, in which we find—" Ambrosius et Rumualdus *Pergomatus judices;* and in the subscriptions,—Ego Romaldo *Scavino* interfui. † Signum manus Ambrosii *Scavino Bergomatis* in his actis interfui." [Mur. Ant. It. T. 2. p. 977. B. 978. D.]—Scabini of specific cities occur frequently: ibid. T. 3. p. 167. A. 1033. A. & D. T. 1. p. 461. D. 463. E. 481. B. 495. E. 497. D. 502. D. 529. C. E. Ughelli, T. 10. p. 313. Mabillon de re dipl. p. 543. F. Fumagalli Cod. dipl. N. 52. p. 222. The Arimen of cities refer also to the amalgamated races. See above, p. 185.

(219) Thus, at the end of the ninth century, in a Placitum at Milan, (Fumagalli cod. dipl. p. 522. N. 131. properly 130.) "... Ursepertus et Ragifredus *judices domni imperatoris*; Rotpertus, Ragibertus, Aginaldus, Hilderatus, *judices ipsius civitatis Mediolanensis.*" The distinction here is plainly, that the latter were Imperial, and the former municipal Judices, properly belonging to the civic constitution. Similar expressions occur very frequently;—e. g. Fumagalli, l. c. N. 102. 106. 120. 121. 133.—Mur. ant. Est. P. 1. p. 179. 193. [Cap. 16.]—Ej. ant. It. T. 1. p. 359. B. 717.

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theless, such is their signification, only in the proper Lombardic cities: for, in the Exarchate, they denote the Dativi. (220)

By the Epistles of Gregory the Great, A. C. 590—604.

The direct proof of the continuance of the judicial system of the cities may now be examined. The oldest evidence on this subject is contained, A. C. 590—604, in the Epistles of Gregory the Great, which were already noticed, on account of their particular connexion with the cities under the Greek supremacy. The address of the epistles to the "Ordini et plebi," of the Lombardic cities of Perusia, Mevania, (Vivania)

T. 2. p. 933. E. T. 6. p. 367.—Ughelli, T. 1. p. 799. T. 5. p. 287. It must not, however, be concealed that, throughout all the deeds of the Lombardic empire, the Roman or city judices are always, in one respect, uncertain. The explanation, here given, is in general correct; but the difficulty arises, from the elected magistracy of the cities being also styled Judices (See below, p. 411. n. 244. 245, &c.): and thus it becomes very frequently impossible to discover which of these two significations is the proper one, in particular instances.

(220) This is the case—with the Judices of Ravenna, Ancona, &c., in the Placitum of Otto III., at the former city, A. C. 996. Mur. ant. Est. P. 1. p. 215. See above, p. 357. n. 162. 163. Likewise—with the Judices Romani, in the two Placita, concerning the Cloister of Farfa, held at Rome, A. C. 1014. Mabillon annales ord. S. Bened. T. 4. p. 239. infr. 705. 1. col. med. And finally—with the six Roman, and two Lombardic Judices, expressly named in a Placitum at Ferrara, A. C. 1015. Mur. Scrip. rer. It. T. 1. P. 2. praef. p. 11. inf.

Nepet, Ortona, Messana, and Tadina, directly establishes the preservation of the Ordo, or Curia—the basis of the Roman municipal system. (221) In like manner, Gregory authorizes the Bishop of Firmum to receive a donation from an inhabitant of the territory subject to that city, and notices the necessity of having it properly validated by the Gesta municipalia, (222) which could have been obtained in Firmum, only by the continuance of the old constitution. Likewise, while Gregory, in his Epistles to the Greek cities, uses Ordini, and Nobilibus, as synonymous expressions, the last is never applied to a Lombardic city; doubtless, because the Lombardic nobility were merely nobles, and not possessed of any constitutional prerogatives.

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(221) See above, p. 337. Perusia, Epp. Lib. 1. Ep. 60. (A. C. 591); at that period Lombardic, but afterwards for a short time under the power of the Greeks, (Beretta ap. Mur. Scrip. T. 10. p. CCXIV. med.)—Mevania. Epp. I. 81. (591.) (Beretta, p. CCLVII. supr.)—Nepet. Epp. II. 11. (592.) at that time, still Lombardic. (Beretta, p. CCXX. infr.) —Ortona. Epp. IV. 41. (594.) (Beretta, p. CCLXXVII. supr.) —Messana. Epp. IX. 76. (599.) (Beretta, p. CCXCIX. supr.) —Tadina. Epp. IX. 88. (599.) (Beretta, p. CCLVII. supr.)

(222) Epist. Lib. 12. Ep. 11. "Gestisque municipalibus alligata." Firmum formed part of the dutchy of Spoleto. Beretta, p. CCLXIII. infr.

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By other authorities, A. C. 721—1089.

A Placentine deed, A. C. 721, is written by the Exceptor of the city of Placentia: (223) now, the Exceptor was the clerk of the Curia; and the Curia must have existed, wherever his office is found. (224) In a Papal epistle also addressed to Placentia, about A. C. 890, that city is very plainly characterized, as a proper civic community. (225) In a Milan deed, A. C. 789, it is narrated, "Una et populo pleno favente animo." And, in another, A. C. 880, from the same place, we find

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(223) Fumagalli cod. dipl. N. 1. princ. "Scripsi ego Vitalis ūr subdiaconus *exceptor civitatis placentinae.*" The Lombardic supremacy was never interrupted in Placentia. (Beretta, p. CXXI. supr. CLXI).—Fumagalli had previously printed the same deed, in his Antich. Long. Milan. Vol. 1. p. 257; but, being at that time unable to understand the words—exc. civ. Plac., their place was supplied by . . . This circumstance does not, however, render their subsequent interpretation, in the least degree, doubtful.

(224) See above, p. 52, and 350. Much less decisive is the often occurring expression—'*Notarii* civitatis Mediolanensis etc. Fumagalli cod. dipl. N. 48. princ. 121. princ. 128. properly 129. (p. 520. supr.)—Mur. ant. It. T. 2. p. 973. D. Notarius is there synonymous with Tabellio and is, consequently, a profession, not a public office. Still, the circumstance increases the number of probabilities, in favour of the existence of the municipal system.

(225) "Stephanus . . . sacerdotibus atque omnibus judicibus Clero et populo *seu universae generalitati* Placentiae commorantibus." Fant. monum. Ravenn. T. 6. p. 2.

the expressions—" pro qua Petrus abbas a venerabili antistite Anspertum seu comite Alberico seu cuncto clero et populo devotissime petiit." (225 a) In A. C. 998, a donation of the Bishop of Modena is made—" cum consensu . . . canonicorum ejusdemque civitatis militum ac populorum." (225 b) Friuli and Istria, which although Byzantine a short period before had become Lombardic in the reign of Charlemagne, were under a public system worthy of particular attention. In a very remarkable Placitum, A. C. 804, mention is made of—Tribuni, Vicarii, Locoservatores, and a Hypatos, as the authorities of a former time, but still in part existing: and in A. C. 815, Louis le Debonnaire gives to the inhabitants the right, according to the " Lex antiqua," of choosing—Rectorem et Gubernatorem, atque Patriarcham, Episcopos, Abbates, seu Tribunos, et reliquos Ordines. In the treaty concluded A. C. 932, with Venice and the city Justinopolis, the latter is represented by a—Locopositus, four Scabini, and a number of other persons. One of the Scabini is at the same time called—Advocatus

(225 a) Antichità Longob. Milanesi, Vol. I. 242.

(225 b) Tiraboschi memorie Modenesi, T. 1. cod. dipl. p. 158. Mur. ant. T. 1. p. 1019. D. and 1021. A.

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totius populi. (225 c) An epistle of Pope John VIII., † A. C. 882, to Valva: (226) and, another from the Archbishop of Benevento, A. C. 988, to Alifa, (227) both Lombardic cities, are addressed—"Ordini et Plebi." The Council of Pavia, A. C. 1022, affords the strongest evidence of the preservation of the free cities among the Lombards. (227 a) Several important authorities are likewise found, in the biography of St Lanfrancus, † A. C. 1089, written soon after his death, by Milo Crispinus, who narrates—"Hic Papia civitate oriundus fuit. Parentes illius, ejusdem urbis cives, magni et honorabiles habebantur inter suos concives. Nam, ut fertur, Pater ejus de ordine illorum, qui jura et leges civitatis asservabant, fuit." (227 b) Among these separate authorities, might be classed the frequent

(225 c) Carli antichità Italiche, P. 4. p. 113—120. p. 130. and Append. p. 5. 12. 13. Milano, 1790, 4to.

226) Johannis VIII. ep. 4. (A. C. 872—882.) Mur. ant. It. T. 1. p. 1010. med. Concerning the City of Valva, see Beretta, p. CCLIV. med.

(227) Mur. ant. It. T. 1. p. 1014. B. Concerning Alifa, see Beretta, p. CCLXXXIII. infr.

(227 a) See below, Chap. XV. n. 25.

227 b) Milonis Crispini Vita Lanfranci, Cap. 1. p. 1.—prefixed to the Opp. Lanfranci. Paris, 1648, fol. See below, (chap. xiv. n. 71), another passage from this author, concerning the Praetores of the same city.

use of the word Respublica. Nevertheless, that term has no connection with the proper municipal system, and generally denotes the Royal Fiscus. (228)

And by the Codex Utinensis.

The highest authority, however, on the condition of the Lombardic Romans, is the Codex Utinensis. The manuscript, with Julian's Epitome of the Novelles prefixed, was formerly preserved, among the records of the Cathedral of Aquileia, and was transferred, from thence, to the archive-office of the Cathedral of Udine, where it was found and afterwards published by Canciani, in A. C. 1789, under the title of Lex Romana. The Codex Utinensis (229) is a commentary, or rather a new work founded on the West Gothic Brevia-

(228) This subject is excellently discussed in Mur. antiq. It. T. 1. p. 968. C. 984. seq. See also L. Long. Caroli, M. 121. 123. 157. (Canc. 1. 164, &c.) Lotharii sen. 22. (ibid. 196.)

(229) An account of the manuscript is given in Canc. IV. 463. seq. The work apparently had no title, until styled by him—"Lex Romana." It begins—"In nomine Sanctae Trinitatis incipiunt Capitula libri primi Legis;" and, afterwards—"Incipit Theudosiani Legis liber primus." [Ibid. 469. Eichorn Deutsche Rechtsg. Th. i. §. 44.] Julian and this Breviarium, do not appear to have been copied, into the same manuscript, from mere accident; but, to have been considered, as forming one work. Canciani unfortunately published the latter only, although the former also is certainly a new version.—[An opinion since verified by

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rium, and is chiefly taken from the Interpretation; although sometimes also from the Text. It ends with B. 2. Tit. 17, according to Schulting 19, of Paulus; and, therefore, wants—the last half of Paulus,—the Gregorian and Hermogenian Codices, and—the passage from Papinian.

Which was compiled in Lombardic Italy, about A. C. 900.

The country and period, in which this work was composed, naturally form the first subjects of inquiry. Its Italian origin is rendered probable, from the circumstance of the manuscript having been found in Italy, among the native archives and not in a library, where it might have been deposited, along with other foreign collections. The frequent occurrence of words of Italian formation renders this opinion certain; (230)

Haubold, who considers the C. Ut. to be not later than the beginning of the 10th century.]

(230) *Con* instead of cum. Cod. Theod. I. 3. (Canc. IV. 469.)—*da* for de. C. Th. II. 25. II. 27. III. 1. 4. III. 10. (p. 474. 475. 476. 478.)—*essere* Cod. Th. IV. 20. (p. 484.)—*cosi* for quodsi. Cajus tit. 8. (p. 505.)—*scusare*. Paul. I. 12. (p. 507.)—*stimatione* Cod. Th. I. 2. 4. (p. 469.)—*patronem* Cod. Th. IV. 10. (p. 482.)—in conjugio *prese* for uxorem ducebat. Cod. Th. IV. 8. 3. (p. 482.)—per suam *tema*, Fear Nov. Valent. 9. (p. 502.)—malle *favellant*. Cod. Th. X. 4. 1. (p. 495.)—Some other expressions, such as Strata, Casa, &c. prove nothing, because they occur among all nations. The following terms, however, deserve attention, although we cannot connect them with any particular country: *Ornongus* for Spurius. Cod. Th. IV. 6. (p. 481.)—*Ato* (*Atus*) *Ata*, for Avus, Avia. Cod. Th. V. 1 4. V. 1. 5. VIII. 10.

and the same analogy is also of great importance, in establishing its date. Thus, the two technical terms—admallare, ammallere and fretum, occur very often, (231) and both are decidedly of Frank derivation, although frequently found among the Lombards, since the time of Charlemagne. Canciani errs in maintaining, that the Codex Utinensis was composed, under the native Lombardic Princes. (232) Mallus, with its derivatives, was frequently used in France, during the ninth century. In the tenth, it very seldom occurs. Now, in Italy, the term was foreign and of recent introduction; and the author who so often employs it, must consequently have lived in the eighth or ninth century; or, at the latest, in the beginning of the tenth.

(p. 485. 489.)—*Traballio Treballio*, Torture. Cod. Th. IX. 1. 4. IX. 10. Cajus tit. 3. Paulus I. 13. 3. (p. 490. 491. 504. 507. cf. trabale judicium in Ducange VI. 1207.)—*samardecare* for sollicitare. Cod. Th. V. 9. 2. (p. 486.)—*Robustura*, *Rebustura*, Treasure. Cod. Th. X. 9. X. 10. (p. 495.) Canc. IV. 464. supr. 467. med., has already remarked the traces of Italian formation in several of the words; although, only in a general and incomplete manner, without giving all the examples.

(231) Admallare or ammallare very frequently: e. g. Cod. Theod. II. 1. 2. II. 5. 4. IX. 1. 4. &c. (Canc. p. 471. 472. 490.) Fretum: e. g. Cod. Th. II. 18. 2. IV. 15. 2. IV. 19. (p. 474. 483.)

(232) Canc. l. c. p. 467. supr.

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Moreover, an examination of the subject and system, generally described in the work itself, will perfectly establish our supposition and fix the date, with even greater precision. The Theodosian Code makes very frequent mention of the Emperor, who speaks either in the first person by Nos; or, in the third, by Princeps. The old interpretation always adopts the latter mode, and applies it, of course, uniformly to the West Gothic king. On the other hand, in most passages where that term occurs in the original Breviarium, and in many where the old text affords no such example for imitation, the Codex Utinensis employs Princeps or Principes. The use of the plural number, when combined with other circumstances, destroys the allusion to a single King or Emperor, while a reference to independent Vassals, great Dukes, or frontier Counts, is immediately suggested. (233) Every doubt however on

(233) Cod. Th. II. 1. 7. (Gothofred II. 1. 9. Canc. p. 471.) "milites qui in obsequio *Principum* sunt."—Cod. Th. II. 1. 9. (Gothof. II. 1. 11. Canc. p. 471.) "*In domos Principum* si Judex provincialis qualecumque malefactorem ibidem invenire potuerit. . . ."—Cod. Th. II. 1. 6. (Gothof. II. 1. 8. Canc. p. 471.) "majores vero causas . . . ante *seniores Principes* definiantur,"—Cod. Th. I. 9. 2. (Gothof. I. 10. 2. Canc. p. 470.) "licentiam habeant, si voluerint, ubi *sui Principes* fuerint, ambulare, et ipsorum causatores *ante ipsos Principes* cum eos ambulare faciant."—This ap-

the subject vanishes, by the use of the word Rex, on some occasions, as a distinct term from Princeps. (234) The public system, which the author had in view, seems therefore to have been the following. There was, in theory at least, a King; but, along with him, powerful Dukes. The rights, attributed in the Theodosian Code to the Emperor, were vested sometimes in the Crown, although

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pears most distinctly from Cod. Th. II. 23. (Canc. p. 474.) "Quod si *quiscumque Princeps* vel Judex . . . tollere voluerit . . . XX *libras auri componat.*" The text and old interpretation apply the punishment to the person who solicits from the Princeps certain prohibited grants. In the third of the above quoted passages, C. Th. II. 1. 6., the Principes possess the right, which the text and the old interpretation attribute to the Rector of the province. It appears, therefore, that they occupied his place. The same occurs in Cod. Th. X. 4. 1. (Gothof. X. 10. 2. Canc. p. 495.) On the other hand, in the fourth of these passages, I. 9. 2. and in XI. 8. (Gothof. XI. 36. Canc. p. 496.) X. 4. 2. (Gothof. X. 10. 15. Canc. p. 495.) I. 2. 4. (Gothof. I. 2. 5. Canc. p. 469.), they have the prerogatives of the Emperor.

(234.) Cod. Th. X. 6. (Gothofred X. 15. i. Canc. p. 495.) "qui fiscum *Regis* exigunt." The text says, "Fisci advocatus," and the old Interpretation, "qui fisci nostri commoda tuentur." Other passages with Rex are—Cod. Th. VIII. 4. 1. (Gothof. VIII. 11. 5. Canc. p. 487.)—Cod. Th. X. 1. i. (Gothof. X. 1. 2. Canc. p. 494.)—Cod. Th. X. 5. 1. (Gothof. X. 14. 1. Canc. p. 495.)—Paulus I. 7. (Schulting I. 4. Canc. p. 506.) In all, the word Rex is first used in the Codex Utinensis, and not in the old Interpretation. There the King, like the Emperor in the Theodosian text itself, speaks by the term—"Nos."

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more frequently in the Dukes; who also possessed many other functions, which in the old empire were exercised by the governors of provinces, etc., and not by the head of the state. This account can only apply to a condition of much impaired royal prerogative. These reasons and the frequent use of Mallus transfer the date of the work, from the times of Charles, or his immediate successors, to the period between the downfal of the Carlovingians, and the reign of the Ottos, A. C. 850—950. The contrasted significations of Rex and Principes also show, that the Codex Utinensis was composed in the Lombardic portion of Italy, and not in the Exarchate. (235) Cancellarius, moreover, is used for Notarius; (236) and could scarcely have borne that signification at a later period. Finally, the country of its origin is shown by a legal form, decidedly Lombardic. In four places, the Patria potestas is uniformly dissolved in the same manner—by the marriage of the son, and—commendation to the King

(235) Many might consider the reverse as proved, by a passage in Cod. Th. IV. 4. 4. (Canc. p. 481.) "Omnis testamenta et alias Cartas *in urbem Rome* apud curiales viros volumus presentare." This has, however, been borrowed from the old interpretation; but in so blundered a manner, as to have lost its appropriate meaning.

(236) Cod. Theod. I. 11. 2. (Gothof. I. 12. 3. Canc. p. 470.) [See above, p. 52. 293. 335. 350.]

or any other patron. (237) The dissolution by marriage cannot be connected with any similar doctrine of law; while that by Commendatio appears to be a purely Lombardic ordinance. The description of the procedure, as taken from the authorities, does not prove that the Lombards dissolved the true patria potestas in this method; since a patria potestas, corresponding with the Roman, never existed among them: (238) but only, that this mode of emancipating children, in itself so singular, must have been peculiar to the Lombards; since, it was borrowed from the decidedly Lombardic form of liberating bondmen by the fourth hand, (239) just as, the Roman emancipation took its solemnities, from their manumission of slaves.

From the Breviarium.

A probable account may easily be given of the causes which led to the composition

(237) Paulus I. 7. 1. and I. 7. 2. (Schulting I. 4. Canc. p. 506.) Paulus II. 8. (Schult. II. 9. Canc. p. 509.) Cajus I. 6. (Canc. p. 505.) The first passage runs thus. "De filios familie, hoc est si filius sine uxorem fuerit, aut si ad Rege, vel ad alterum patronum commenda tum non fuerit . . ." Hallam, Middle Ages, i. 169. Lond. 1826, 8vo.

(238) Carolus de Tocco ad Lombardam II. 35. 7, Ex hoc nota quod filius non est in potestate patris *isto jure.*" (i. e. according to the Lombardic law.) Andr. de Barulo Comm. in Leges Long Tit. 8. "De jure autem Long. filius non est in potestate patris."

(239) L. Long. Rotharis 225. (Canc. i. 82.) Liutprand. II. 3. (p. 103.) V. 22. (p. 112.) Aistulph. 2. (p. 144.) [See

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of the Codex Utinensis. Undoubtedly, a Frank count or clergyman brought the Breviarium with him into Italy; where, the universal want of manuscripts of the Roman Law favoured its credit and circulation. A direct promulgation of the real Breviarium was indeed impossible; but, this compilation was suited to the necessities of the times, and supplied all defects, by EMBODYING THE PUBLIC AND PRIVATE LAW OF THE LOMBARDIC ROMANS, AT THE END OF THE NINTH, OR BEGINNING OF THE TENTH CENTURY.

And contains important information regarding the public institutions of the Lombardic Romans.

In so far as the Codex Utinensis contains private ordinances, the discussion will more properly find a place, in the particular history of the Law of Lombardic Italy. At present, we shall consider it, as an authority on the public institutions alone; and, regarding its credit in this particular, all the remarks already applied to the old interpretation might be repeated. (239 a) Here, also, the verbatim reception of the old Text, or even of the old Interpretation, would prove little; as the work must then assume the character of a mere servile transcript. On the other hand, frequent and obvious departures, both from the meaning and phraseology of the original, are imputable only to intention

Unterholzner on the Form of Manumissio p. Vindict. and Emancipatio in the Zeitschr. für gesch. Rechtswiss. ii. 139.]

(239 a) See above, p. 284.

and design and become, accordingly, important evidence of the real condition of the law, at their date. Two circumstances, however, exclusively belonging to the Codex Utinensis, must be particularly noticed. The stupidity and want of knowledge displayed in its composition are really incredible, and raise the old interpretation by contrast to the rank of a completely classical composition. (240) Canciani regrets much this lamentable state of the compiler's understanding, and strives to extenuate all his failings. The style, it is said, being at that time prevalent in the courts, was prudently and even wisely preferred to more classical language: (241)—a defence, which the author himself was certainly never in a condition either to make or understand. This state of mind, as has been already remarked in the case of the old Interpretation, might account for gross misapprehensions of abstract law-relations and doctrines, but could not be the occasion of any perplexity, regarding those public institutions, which might everywhere be seen in active operation, and

(240) Among the illustrations of the private law, more examples shall be given. One may here suffice. Paulus II. 13. 4. (Schult. II. 17. 10. Canc. p. 510.) "Mutus homo et emere et vindere potest; nam furiosus hoc est furiosus, qui multum senex est, qui ille qui ni nimiam etatem est, jam nec emere nec vendere non potest."

(241) Canc. l. c. p. 464. med. 467. med.

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which the dullest could scarcely misapprehend. It is therefore quite impossible, that entirely false, or absolutely unintelligible descriptions of the public system could have been inserted in the Codex Utinensis. A mere copy, or a total omission of the old Text, would have afforded in such cases the best disguise. The second, and indeed most important difference between this Codex and the ol B reviarium arises, from our knowledge of the circumstances connected with the compilation of the latter, while nothing is certain regarding the origin of the former, except its country and æra. We might therefore be inclined to believe, what cannot be maintained of the Breviarium, that the new matter contained in the Codex Utinensis arises, from fiction and not from the study of a really existing state of the law; but, the extraordinary dulness, and universally apparent ignorance of the compiler, and the obvious trouble which he finds in expressing any of his thoughts, render that supposition altogether untenable. So poorly endowed a person finds his chief joy, in bringing the labour to a conclusion, and never lays schemes for the deception of his readers. For these reasons, we consider the credibility of this work, in so far as it treats of public institutions, to be above all question: and shall accordingly proceed to examine its contents.

A. The cities possessed independent jurisdiction; and, the fines, for evading it, were paid to them. (242)

B. The Decurions—Boni homines (243) of the cities elected a Judex or Judices to execute the duties, arising from that jurisdiction. (244) Sometimes, this officer is styled

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(242) Cod. Th. II. 18. 2. (Gothof. ibid. Canc. p. 474.) "quinque partes facultatis suae de illas res, que sub illo Judicem habet, *ad illam civitatem* det, in cujus finibus res, de quo agitur, fuerit constituta." Both the text and the old Interpretation give the fine to the city; but while the former exacts only $\frac{1}{7}$th of the value of the disputed subject, and the latter $\frac{1}{7}$th of the fortune of the pursuer, the penalty is here increased to five parts, or $\frac{5}{7}$ths of the pursuer's fortune.

(243) This signification of Boni homines shall be afterwards illustrated, See below, p. 424. seq.

(244) Cod. Th. I. 10. 1. (Gothof. I. 11. 1. Canc. p. 470.) "Quicumque *Judex*, qui in patria constituitur, per consensu eorum qui in ipsa patria sunt ipsa judiciaria recipere debent: quod sub se Judex illa Judiciaria *sine consensu bonorum hominum de ipsa patria* per sua cupiditate prendere presumpserit, secundum legem V. libras auri fisco solvere cogatur." The text and the old Interpretation speak of Defensors; and the expression Judex, here used, is not merely a variation, and an evidence of the originality of the passage, but an additional proof of the work having originated in Italy, and not in Gaul. In the latter, the office of Defensors was preserved, until very recent times. (See above, p. 73. 297. 299.); while the universal prevalence of magistrates in Italy, as the leading functionaries, had caused the Defensors to fall into disuse. In Italy alone, therefore, could an occasion have occurred for

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merely Judex; and, at other times, Judex Provinciarum or Provincialis. (245) He is entirely the old magistrate, with the exception of his powers being even more extensive. Besides his judicial functions, the charge of the whole property and revenue of the city, and the inferior appointments in that department, were intrusted to him. These deputies performed the same duties as the persons in charge of the public revenue, or Royal Fiscus; and their offences were punished by the Judex and citizens. (246) At this

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substituting another name, as in this passage, in the place of Defensors.

(245) These appellatives often occur: e. g. Cod. Th. I. 6. 4. (Gothof. I. 7. 5.)—Cod. Th. I. 6. 5. (Gothof. I. 7. 7. Canc. p. 470.) Whether this Judex was a subordinate local and municipal magistrate, or a superior officer, is uncertain, from his designation. The following authorities, however, decide the question:—Cod. Th. II. 1. 9. (Canc. p. 471. See above, p. 404. n. 233.), where the Judex Provincialis is opposed to the Principes; and—Cod. Th. 1. 6. 3. (Canc. p. 470.) "Judex provinciarum hoc scire debent . . . ut nullum hominem per suam potentiam *et pro gratia de suo seniore* pauperes opprimere non presumant." Provinciarum probably stands here for Provincialium. This Judex would then become the magistrate of the Provincials or Romans.

(246) Cod. Th. I. 6. 4. (Gothof. I. 7. 5. Canc. p. 470.) "Judices provinciarum opera dare debent, ut *per singulos agros et loca* tales ordinet *actores* ut *sicut de publica causa* cura habeant . . . Si hoc facere neglexerint, poenas *Judicis et civium* in se noverint esse vindicandum." (Actor here signifies a Fiscal-officer. Ducange v. actor. T. 1. p. 110.)

period, as formerly during the old empire, several perhaps two Judices presided in each city. (247) The time of their continuance in office is uncertain. (248)

The Decurions.

C. The Judex did not administer justice alone; but, in conjunction with the Decurions who assisted him, as assessors or judicators. (249) The Decurions assumed also the judicial functions, on the trial of Roman cases, before the supreme courts. (250)

The Court of the Defendant.

D. The competency of the jurisdiction was generally determined, by the condition of

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This passage is quite original in the C. Utin. for, the text and old interpretation command the Provincial Rector, to inquire into the frauds and extortions of the revenue collectors; and nothing is said of their appointment, or duties.

(247) Cod. Th. III. 11. (Canc. p. 478.) "ad alios Judices, si *in ipsa civitatem et loca sunt.*" This passage does not, however, prove the universality of the practice. [See above, p. 29.]

(248) According to some authorities, the time of continuance in office was unlimited; and, the Judex might remain, until removed, by a new election. Cod. Th. I. 11. 2. (Gothof. I. 12. 3. Canc. p. 470.) III. 11. (Canc. p. 478.) But, these very passages, being mere transcripts of the ordinances in the text and Interpretation concerning the rectors of the provinces, cannot be taken as guides.

(249) Cod. Th. I. 6. 2. (Gothof. I. 7. 2. Canc. p. 470.) "neque solus judicium donet, sed *cum bonos homines.*" This part of the passage is also quite original, and unsupported by the old sources. Cod. Th. IV. 8. 1. (Canc. p. 482.) "per pactionem Judices *et bonorum hominum* . . . revertatur."

(250) Cod. Th. XI. 8. (Gothof. XI. 36. Canc. p. 496.) See below, p. 419.

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the defendant, either when both litigants were Romans, if from different cities, (251) or when the one party was Roman, and the other, German (252)

The Judices Publici or Fiscales and Privati or Mediocres.

E. This municipal jurisdiction was notwithstanding only subordinate and limited. There were besides two other classes of Judices,—publici or fiscales, and—privati or mediocres. Every branch of the constitution of the dominant German race bore the designation of Publicum; while the term Privatum was applied only to a particular corporation or community. Judex pub-

(251) Cod. Th. II. 1. 4. (Canc. p. 471.) Nov. Marciani 1. [Hugo, p. 1358. §. 6.] Canc. p. 503.

(252) Cod. Th. II. 1. 2. (Canc. p. 471.) "Si inter patrianum privatum, et militem qui cotidie in servitium principes adstat, si inter eos de qualecumque rem causam advenerit, si ille milex illum privatum patrianum ammallaverit, judex de ipsa patria exinde inter eos justitiam faciat; et si forsitan ille privatus homo illum militem accusaverit, ille, cui militat, ipse de eo justitiam faciat." The text and the old Interpretation make this distinction only in criminal matters, and leave all civil actions to be decided by the civil judge, without any regard to the condition of the parties. [See above, p. 83.] The Milites of this quotation are plainly the Germans; i. e. every person, who was neither a Roman, nor a member of the municipal communities—privatus patrianus. This expression evidently belongs to a period, when the feudal constitution had been much developed, and the whole national system pervaded by its spirit. In like manner, another authority mentions—"Milites, qui in obsequio Principum sunt." Cod. Th. ii. 1. 7. (Gothof. ii. 1. 9. Canc. p. 471. See below, n. 259.)

licus, therefore, signified—the Judge who possessed the Judiciaria potestas, under the old German system. This belonged to the count or his deputies, who, according to the laws and deeds, were all appointed by the king. (253) During the supremacy of the original constitution, the feudal connection, as a mere private agreement, was distinguished from the Publicum: (254) but, when the old policy had been displaced by the feudal system, its institutions formed the Publicum; and, the Judices publici of the Codex Utinensis are the—great Dukes or Principes, including the vassals, to whom their judicial powers had been deputed. Very elevated rank is not therefore the uniform characteristic of the Judex Publicus. Of proper jurisdiction he had none; for, Judex, in an extended sense, denotes, every public officer, including even those in the departments of finance; and the only general features to be found among the Judices Publici, arose from the character of their office, and the

(253) Ducange v. Judex publicus T. 3. p. 1571.

(254) A deed, A. C. 844, (Gallia christ. T. 6. Instrum. p. 6,) narrates—"Ut nullus *judex publicus* neque quislibet ex judiciaria posestate, *aut ullus ex fidelibus nostris.*" In a deed, A. C. 843, (ibid. p. 5,) and several others, similar expressions occur. Judex publicus is here the Count; and the other functionaries—ex judiciaria potestate, are the Centenarii, &c.

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mode of their appointment. The title Judex fiscalis is precisely the same with Judex publicus, and designates an officer, named by the king. According to Ducange, indeed, the term signifies the manager or steward of a royal domain, over which his jurisdiction likewise extended. (255) A person with these limited powers may undoubtedly have borne that title, although neither exclusively, nor universally; for, the first and most general Judex fiscalis was the Count. (256)

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(255) Ducange v. Judex fiscalis, T. 3. p. 1572. Concerning the Judicum fiscale and the Judiciaria potestas, there is a remarkable passage, in Interpr. Pauli (Schulting) V. 12. §. 5.—"Officium fiscale id est Judiciariæ potestatis." The text says merely "Officium fiscale." The use of the expression Judiciaria potestas was so frequent during the time of the Franks, that we might almost be tempted to consider it as introduced by them.

(256) L. Ripuar. T. 53. (Canc. ii. 310.) "De eo qui *Grafionem* occiderit. Si quis *judicem fiscalem*; *quem Comitem vocant*, interfecerit, sexcentis solidis multetur." Tit. 51. "De eo qui *Grafionem* . . invitat. Si quis *judicem fiscalem* . . . . invitare praesumpserit." Ducange himself quotes these decisive authorities. It is altogether erroneous to suppose, that the Judex fiscalis is distinguished, as a person of inferior importance, from the Grafio, &c. in L. Ripuar. T. 88. 89. (Canc. ii. 320.) These are separate titles; and, the person, designated in the one (T. 88.), by a careful enumeration of his different offices of— Domesticus, Comes, Grafio, &c., is styled in the other, by the general term of—Judex fiscalis.

With the difference between their Jurisdictions.

The limits of the municipal jurisdiction still remain to be defined. The city magistrate appears to have been the judge in the civil actions of Romans, and in the lighter criminal offences, if committed by persons in the humbler ranks of life. All the greater crimes among the Romans generally, and the more trivial delinquencies of the principal Romans, were punished by the Judex publicus. These doctrines, concerning the two-fold jurisdictions and their practical limits, will, however, be better explained by extracts from the Codex Utinensis itself.

1. " Nulli penitus in cibilibus causis militaris vel tuitio et executio tribuatur ; similiter omnes, Judices, *aut fescales sint aut privati* hoc sciant, ut ad nullum hominem non liceat aliud facere, nisi inter ipsos de recta justitia judicare. " (256 a)

There were, consequently, only two general classes of Judices—fiscales and privati. It ought to be remarked, that the whole quotation from " similiter " is peculiar to the Codex Utinensis, and is altogether wanting, both in the Text and old Interpretation.

2. " Si quicumque homo ad duos Judices, *ad publicum et ad privatum* (hoc est privatus, qui actor ecclesiarum est.) " (256 b)

(256 a) C. Th. l. 8. (Gothof. 1. 9. Canc. p. 470.)

(256 b) C. Th. ii. 18. 2. (Gothof. ibid. Canc. p. 473.)

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This passage also mentions two orders of Judices—publici and privati; and, by comparing it with the former, the identity of Judex fiscalis and publicus, will be fully established. The words ad publicum, etc. are also peculiar to the Codex Utinensis; for, the Text says merely—diversos Judices; and, the old Interpretation,—duos Judices. The explanatory addition "Actor ecclesiarum," deserves attention. This officer possessed no jurisdiction in spiritual matters, but only in temporal concerns over the vassals and tenants of the church; and, he is noticed merely as an instance of a Judex privatus, not, as the solitary functionary of that class. The first and most general example, particularly from the views prevalent in this Codex, was undoubtedly the municipal magistrate; with whom, however, the Actor was assimilated in two particulars; neither of them being named by the king, and both having an independent jurisdiction.

3. "*Minores causas* inter privatos, *Judices ipsi privati* discutiant et judicent, de furtivo cavallo aut de modice terre, aut de vaso domi, (257) de istas aut de alias minores causas,

(257) C. Th. ii. 1. 6. (Gothof. ii. 1. 8. Canc. p. 471.) This absurdity "de vaso domi" is explained by the words in the old Interpretation "seu domus invasae."

mediocres Judices definiant: *majores* vero causas *inter altas personas* (258), qui per scripta in accusationem veniunt, *ante seniores Principes* definiantur: et si forsitan privati Judices alciores causas ad Principes fraudare voluerint, quinque libras auri solvant."

The Judices privati and mediocres are here plainly synonymous. In the text, they are totally omitted, and the old Interpretation styles them—*mediocres* Judices .... id est aut defensores aut assertores pacis." Opposed to these inferior judicial functionaries, are—the Provincial Rectors of the Text—the Gothic Counts of the old Interpretation, and—the Seniores Principes of the Codex Utinensis. The last are consequently the same with the Judices publici, or fiscales of the preceding quotations. (259) Our author's sources had ordain-

(258) By this ordinance, 1. all the heavier crimes; and, 2. all the delinquencies of the principal Romans, were incompetent before the municipal judge. The immediately following passage in N. 4. favours the exemption of the graver offences. These altæ personæ may, however, have been Lombards, like the Milites in n. 140. Indeed, the other class of persons—"privati," named in the beginning of the passage and with whom the altæ personæ are contrasted, rather supports this opinion.

(259) The immediately following passage, (Cod. Th. II.

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ed, under threat of punishment, that the Rectors should not be occupied with trifling suits; but, here, the reverse is appointed; and a punishment is awarded against all encroachments upon the superior jurisdiction, by the municipal judge. That the ordinance is restricted to criminal matters as in the Text and old Interpretation, is plain, both from several expressions in the passage itself, and from other authorities already noticed; (259 a) which cannot, upon any other supposition, be reconciled with this quotation.

4. "Si quicumque persona de criminale causa acusatus fuerit, aut de homicidio, aut de magnis criminibus, de ipso crimine *a Principem* dicendum est, ut *bonorum personarum judicia* (leg. judicio) *ante Principe* finiatur." (259 b)

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1. 7. Canc. p. 471.) says—"Quicumque homo, qui *suos Judices, qui in sua provincia commanent*, postposuerint, et ad *milites, qui in obsequio Principum sunt*, suas causas agere presumpserint . . . in exilio deputetur. . . ." Here, the vassals of the Principes are contrasted with the municipal judge, and are consequently viewed as Judices publici; while, according to the above quoted passage that title belongs to the Principes themselves. There is, however, in reality, no inconsistency; for the jurisdiction of these vassals was merely derivative, and belonged to the same class with that of their liege lords.

(259 a) See n. 252. 259. 261.

(259 b) C. Th. xi. 8. (Gothof. xi. 36. 1. Canc. p. 496.)

This passage perfectly confirms and completes the meaning of the preceding. The Text of the Theodosian Code, and the old Interpretation, are quite different. According to them, an appeal to the emperor or king in the graver offences shall not be competent, when the crime is confessed, or proved by irresistible evidence; and shall be allowed only, when the guilt is not sufficiently established; although, the old Interpretation, allows even those clear cases to be reported to the king. Finally, the princeps, like the municipal judge, has the assistance of the Boni homines, as Judicators—bonorum personarum judicio. (260)

F. In all civil suits between Romans, and

The right of Appeals.

(260) These are the most explicit authorities, concerning the character and rights of the two classes of Judicial functionaries. The following are very indefinite:—Cod. Th. V. 5. in f. (Judex puplici. Canc. p. 486.)—Cod. Th. IV. 12. and XVI. 1. 4. med. (fiscales Judices, Canc. p. 483. 409).—For *Actor* publicus, the expression Judex publicus is used in Cod. Th. XII. 1. 1. VIII. 1. 1. compared with XIII. 2. 1. (Canc. p. 497. 487. 498.) A remarkable statement is made, in a deed of King Dagobert, in favour of the monastery of St Dennis:—" Et ut ab omnibus optimatibus nostris, et *Judicibus publicis ac privatis* melius ac certius credatur." Ducange v. Judices privati. iii. 1572. infr. These Judices privati, as in the Cod. Utinensis, may be the Roman Municipal Judges, or the Defensors of the cities in France.

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incases competent before the municipal court, the superior judge had no concurrent jurisdiction. (261) Pupils, widows and sick persons only have the privilege of bringing their questions before the Princeps. (262) The same course might be followed by every suitor, when the municipal judge delayed the decision. (263) The competency of a proper appeal to the Duke is nowhere expressly recognised; although notice is taken of a report to him by the municipal judge. (264) Where the jurisdiction of the duke was valid, his judgment against the disobedient city-magistrate might be enforced by a punishment awarded by himself. (265)

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(261) Cod. Th. II. 1. 7. (Gothof. II. 1. 9. Canc. p. 471.) See above, n. 259. Cod. Th. IV. 13. (Gothof. IV. 16. 1. Canc. p. 483.): "In causas inter privatos homines, quod publice actiones non sunt, nemini liceat ad extraneum Judicem ipsa causa in judicio mittere; nisi ante *suum privatum Judicem* eam liberet."

(262) Cod. Th. I. 9. 2. (Gothof. I. 10. 2. Canc. p. 470.) See above, p. 404. n. 233.

(263) Cod. Th. II. 1. 5. (Gothof. II. 1. 6. Canc. p. 471.) "Ad nullum hominem liceat ad extraneum judicem suam causam agere; nisi forsitan si ei suus judex suam causam dilatare voluerit, *postea liceat eis suas causas ad Principem reclamare.*" The Text and old Interpretation did not allow this removal of the suit, but made the Judex only responsible.

(264) Cod. Th. II. 18. 1. (Canc. p. 473.) "... ille Judex per ordine exinde ad suum Principem rationem donet, quomodo inter eos judicavit."

(265) Cod. Th. I. 2. 4. (Gothof. I. 2. 5. Canc. p. 469.)

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The Ecclesiastical Courts.

G. The ecclesiastical jurisdiction is extended. By the Theodosian Code and the old Interpretation, a criminal charge against a bishop was decided by bishops, and all other questions, connected with religion, were competent in the bishop's court alone. With these two exceptions, every suit was reserved to the secular judge. In the Codex Utinensis, on the other hand, this exemption from the Episcopal jurisdiction, is limited to criminal matters. Civil lawsuits between ecclesiastics and religious differences may be judged by the bishop, along with other clergymen. (266)

The privilege of Minors.

II. A decree, to authorize the alienation of the property of a minor, can only proceed, from the Judex publicus: (267) and, in like manner, the privileges of majority are communicated by the Principes. (268)

The Municipal Gesta.

I. Concerning the Jurisdictio voluntaria, —the Gesta are frequently mentioned; (269

"Omnis Judex, qui haec non custodierit *quod Principes per legem judicant*, ad stimatione Principis ipso Judice damno condempnetur." The text and old Interpretation do not refer to ordinary judgments, but to the rescripts of the Emperor or King.

(266) Cod. Th. XVI. 1. 3. (Gothof. XVI. 2. 12. Canc. p. 499.) XVI. 4. (Gothof. XVI. 11. 1. Canc. p. 499.)

(267) Cod. Th. III. 1. 3. (Canc. p. 476.) See above, p. 290. n. 32.

(268) Cod. Th. II. 17. (Canc. p. 473.)

(269) e. g. Cod. Th. III. 5. 1. III. 5. 2. VIII. 5. 1. fin. (Canc. p. 476. 488.)

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although, the well known passage, which prescribes their general form, omits many of the old requisites, particularly the presence of the Magistrate and Exceptor. (270)

The Decurions and Boni Homines are frequently mentioned together.

It has been assumed in this inquiry, that the exclusive power of the Senate, as in the earlier aristocratic constitution, had continued, and that even the old Decurions, under the name of Boni Homines, elected the magistrates, and under that of Judicators, attended the courts. Still these suppositions are attended with numerous difficulties, and require to be carefully examined. The expression Curiales occurs even more frequently than Boni Homines; and, often both are used toge her. Now, if the former has preserved its old signification of Decurions, the Boni Homines must be the rest of the citizens. This view, to which many authorities give an appearance of probability, (271)

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(270) Cod. Th. XII. 1. 7. (Gothof. XII. 1. 151. Canc. p. 498.) "Gesta hoc est, omnis carta, sic firma esse potest, si cum aliis testes III. curiales eo firmaverint." [See above, p. 94.]

(271) Cod. Th. VIII. 5. 1. fin. (Gothof. VIII. 12. 1. Canc. p. 488.) "... gesta apud *bonos homines vel curiales* testes firmatas esse debent." The old Interpretation (fin.) states only, "apud Judicem *aut apud Curiam.*"—Cod. Th. XII. 2. 1. (Gothof. XII. 6. 20. Canc. p. 498.) "ad electionem multorum *bonorum hominum vel de alios curiales.*" The old Interpretation (princ.) says "praesentibus aliis *Curialius vel populo.*" This passage, although apparently deci-

would be extremely important in its results: as all doubts, regarding the democratic character of the constitution, would then be removed. If, on the contrary, the original institutions were preserved, which is essentially our opinion, the expressions may be viewed as synonymous; and, in the Boni Homines, may be discovered—the old Decurions. Both alternatives deserve attention.

But the Boni Homines are the Decurions.

The analogous signification of the words Boni Homines, among the Germans, favours the supposition of their being employed to denote the old Decurions. Those, in possession of all the national prerogatives and of the full capacity of enjoying every civil and political right, were called, by the Germans,—Boni Homines; while, the same description of citizens, even before the overturn of the Western Empire, were, in municipal phraseology, styled Decurions. (271 a) To them alone and not to the rest of the inhabitants, the character applied; and the constitution must have been changed, before its privileges could have been extended to the rest. We shall afterwards speak of the improbability of such a change; but of this synonymous

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sive, is in reality no proof, because the term Curiales has a quite different meaning in the Codex Utinensis from what it bears in the old Interpretation. See below, p. 427.

(271 a) [See above, p. 23. 205.]

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signification of Boni Homines and Decurions in early times, all may be convinced, by examining the collections of Frank forms, and particularly the Appendix to Marculf; in which, Boni Homines and Curiales are used indifferently, but always in similar circumstances, and always validating the act in a similar degree. The Boni Homines of these precedents are—the Frank Rachinburgers; and the Curiales, the Roman Decurions. Both classes performed the same duties; and even in subsequent centuries, the municipal Decurions are frequently designated by the term—Boni Homines. Thus, in Florence, a committee of Twelve Councillors bore that name. (272) Other examples occur, A. C. 1124, in Lucca, (273) in an ordinance of Louis VII. of France, A. C. 1145, (274) and in Salamanca, without any date. (275)

And, the Curiales, the Collectors of the Revenue.

Farther, the accuracy of this explanation

(272) Ducange v. Boni homines, i. 1228. infr.

(273) In a treaty of peace in Mur. ant. Est. P. 1. C. 17. p. 182. [or p. 155. med. Ed. Modena, 1717.] "Audiat me, quaeso, universus Consulatus, *ceterique eidem boni homines assidentes.*"

(274) See above, p. 214. n. 65. "consilio *bonorum virorum* ipsius civitatis."

(275) Among the manuscripts in the Escurial, there is "Carta quam *boni homines civitatis Salmantic.* fecerunt ad utilitatem ejusdem civitatis." membr. in 8. Büsching histor. Magazin Th. 5. S. 121.

is confirmed, by the Curiales of the Codex Utinensis being almost uniformly different from the old Decurions. Now, if Boni Homines were not the Decurions, but the inhabitants generally, the former are altogether omitted;—of all suppositions the most improbable. The Curiales of this Codex, however, are the Romans employed in the collection of the revenue,—the Exactors, Susceptors of the Theodosian Code and old Interpretation. This is proved, by the following passages:

1. Cod. Th. XII. 2. 1. (Gothof. XII. 6. 20. Canc. p. 498.) "De susceptores prepositis et arcariis .... *Curiales, qui fiscum, aut publicum actum exigent*, non in occulto eos elegant, sed ad electionem multorem bonorum hominum, vel de alibs curiales, ipsum ministerium accipiant."

The text says, "Exactores vel Susceptores;" and, the old Interpretation, "Exactores et Susceptores."

2. Cod. Th. III. 1. 8. (Canc. p. 476.) "Quicumque *curiales que fiscum dare debet*, si propter ipsum fiscum aut puplicum debitum fugire voluerit ... ad servitia puplica revocetur." ...

The Text and old Interpretation speak of those, who withdraw from the Curia: not indeed from an actual public employment, but from the duties and bur-

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dens which might be imposed upon them as Decurions, in behalf of their own city and of the general government.

3. Cod. Th. III. 1. 3. (Canc. p. 476.) " ante Judices puplicos *aut curiales publicos.*"

4. Cod. Th. XVI. 1. 4. (Gothof. XVI. 2. 39. Canc. p. 499.) " inter ipsos curiales *officium publicum* faciat."

The signification of publicum has been already explained. (275 a) The word is here original, and is found neither in the Text, nor old Interpretation.

5. Cod. Th. V. 2. (Canc. p. 485.) " Si curiales *qui fiscales causas per* . . . . t (probably peragunt).

6. Nov. Theod. Tit. 8. (Canc. p. 500.) " Quicumque curiales *qui fiscales est constitutus* " ad nulla alia causa suus senior eum non debet promovere ad agendum; nisi tantum in sola *fiscale et curiale causa* permanere debet."

7. Nov. Theod. Tit. 11. (Canc. p. 500.) " . . . si forsitan eos curiales, *aut in fiscale actione* mittere voluerit."

8. Nov. Valent. Tit. 9. (Tit. 10. Canc. p. 502.) " curiales vero *pro fiscale debita* suam facultatem vendere possunt."

9. Nov. Valent. Tit. 11. (Tit. 12. Canc. p. 502.) " curiales *publici, qui fiscales acciones habent.*"

(275 a) See above, p. 414.

The explanatory reference to the Fiscus is found neither in the original Text of any of the passages, nor in the old Interpretation.

The term Curiales may therefore be considered as no longer denoting the Decurions, but the collectors of the revenue. By adopting this opinion, however, it is by no means maintained, that every notice of the Curiales in the Codex Utinensis must be understood, as referring to these Fiscal officers; for, in all the passages, merely copied from the Sources, inattention or indifference to the precise meaning may easily account for its insertion. Thus, the Gesta were still unquestionably conducted before the ordinary Decurions or Boni Homines; although, our author, from carelesness, has used the term Curiales, (276) in a sense different from its ordinary meaning throughout his compilation.

The Decurions were Judicators in the city courts.

Another reason, in favour of this account of the Boni Homines, is found in their above mentioned occupation as Judicators in the city-courts. (276 a) The Codex Utinensis was composed, long after Charlemagne; and,

(276) See above, n. 270. Similar passages, concerning the Gesta before the Curiales, may be found in—Cod. Th. III. 5. 1. IV. 4. 4. (Canc. p. 476. 481.) That, in fact, the Gesta were not conducted before these fiscal officers exclusively, but before the Boni homines, is established by—Cod. Th. VIII. 5. 1. fin. (Canc. p. 488. See above, n. 271. princ.)

(276 a) See above, p. 413. C.

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since his reign, the elected Scabini had become general over the Frank empire. Even Roman Scabini existed in several districts. If therefore the Boni Homines be the inhabitants generally, it cannot be explained, why they, in preference to the Scabini, were called to officiate, as Judicators. On the other hand, assuming the Boni Homines to be the Decurions, they occupy the very situation of the Scabini among the Germans: and are, in truth, the Scabini of the Romans, (276 b) under a different name; although, in other passages, they are expressly designated by that title. A particular ordinance of the Codex Utinensis also proves, that the Boni homines were a particular and distinguished class of citizens, and not the whole inhabitants. Of unworthy Advocates, it is said, that they—"nec *inter bonos homines*, nec inter alios Judices locum habere debent." (277)

The Municipal Constitutions still continued Aristocratic.

Finally, this meaning of Boni Homines is supported, by historical evidence. It is ge-

(276 b) See above, p. 234. 277.

(277) Cod. Th. II. 10. 1. fin. (Gothof. ibid. Canc. p. 472.) The text and old Interpretation exclude them, from the—"honestorum coetu judiciorumque conspectu; i. e. from the farther exercise of the duties of their profession; for, honesti here denotes the other advocates. Cod. Th. III. 19. 4. med. (Gothof. ibid. Canc. p. 480.) requires, the Tutorial inventory to be sealed up by the Boni Homines: while, the Text and old Interpretation name, in their place, the—Senatores, Primates Civitatis, &c.

nerally acknowledged, that before the decline of the Western Empire, the municipal institutions were aristocratic; and, in the twelfth century, during the flourishing period of the Lombardic cities, the same character applied to them, as shall be shown in the sequel. A small body of the people, under the name of Commune, possessed in Bologna the sovereign power, like the Curies in old Rome: (277 a) and only in the thirteenth century did the Populus, or Plebeians, obtain first an equality of rights, and afterwards the mastery. The prevalence of a democratic constitution between these two fixed aristocratical periods, is consequently altogether an improbable supposition: especially, when we remember, that in those years, there existed among the inhabitants of the cities, no distinct notions on the value of political rights, and that the universally prevailing ignorance made a blind adherence to old systems more natural than an anxiety for new.

The term Plebs has an Ecclesiastical signification.

The reasons, however, must not be withheld, which favour the opposite opinion. Frequent mention is made of a Plebs, apparently synonymous with Boni Homines; and, thus democracy is detected in the constitution. But, Plebs or Plebes, during the mid-

(277 a) [See Niebuhr's Rom. Hist. by Hare and Thirlwall, i. 252. 287. where explanations are also given (p. 260. 273. 290.) of the terms Decemprimus and Decurio. See above, p. 78.]

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dle ages, generally bore an ecclesiastical signification: and denoted—the parish church, —the parish itself, or—the parishioners. (278) The signification of the term, in several passages of the Codex Utinensis, is indeed so obvious, as entirely to exclude its political meaning. (279) Farther, the Boni Homines repeatedly appear as witnesses and compurgators; and these duties are said to be better adapted to the ordinary inhabitants, than to the Decurions. (280) Nevertheless,

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(278) Ducange v. Plebes, V. 559.

(279) Cod. Th. IV. 7. (Canc. p. 481.) "De manumissionibus in ecclesia ... Quicumque homo servos suos ingenuos dimiserint, *in Bassilica* presente sacerdotes *et plebem* dimittat. Cajus Tit. 1. princ. (Canc. p. 504,) "in ecclesiam *ante plebem*." Cod. Th. V. 1. 2. (Gothof. ibid. Canc. p. 485.) "adoptivum, hoc est qui ante curiales *vel plebe* gistis fuerit adfiliatus." The Text mentions Adoption simply; while, the old Interpretation merely adds, "id est, gestis ante curiam adfiliatum." See above, p. 289. n. 29.

(280) Cod. Th. VIII. 5. 1. fin. (Gothof. VIII. 12. 1. Canc. p. 488.) "traditionem faciat non absconse, sed presente bonos homines." Cod. Th. IV. 16. fin. (Gothof. IV. 19. Canc. p. 483.) "bonos homines in testimonium suum ducat." To this subject also belongs one of the most remarkable passages in the whole Codex. Instead of the writers, mentioned in Valentinian's Ordinance, regarding a difference of opinion among the law authorities, the compurgators are inserted. [See above, p. 8. n. 4.] Cod. Th. I. 4. (Canc. p. 469, after an unintelligible commencement.) " ... si unus de illis habuerit amplius homines, qui ejus causam teneant, quam ille alius; qui majorem numerum habuerit *de bonos homines*, ipse in judicio secundum legem suam causam

the Boni Homines were often Judicators; between whose functions, and the duties of witnesses, there existed so close a connection, since the influence of the German system, (280 a) that our well-grounded explanation of the Boni Homines remains unshaken.

The Germans universally respected the independence of the cities.

Such was the fate of the Roman cities, in the principal provinces of the subverted

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vincat." The reference to the Compurgators is rendered plain, by a comparison with—Paulus II. 1. 1. and—Cod. Th. XI. 13. 1. (Canc. p. 509. 497.)

(280 a) See above, p. 211. The Codex Utinensis, from which Canciani took his Edition, is no longer in Udine, and may perhaps be considered as lost. (Blume Iter Italicum, Th 1. S. 200. Berlin, 1821, 8vo.) On the other hand, Hänel in 1825 discovered another MS. of this compilation, in the Library of St Gall, (Cod. 722,) since printed in—Walter Corpus Juris Germ. Ant. III. 691—755. Berol. 1824, 8vo. It is more complete than the one used by Canciani, and contains all the Books of Paulus, but wants the Gregorian and Hermogenian Codices, and the passage from Papinian. The text of such parts as have been compared agrees with Canciani. [Frequent use is afterwards made of the Cod. Ut. See below Chap. VIII. Text to n. 57. Chap. XIV. Text to n. 74. 81. 82. 135. Chap. XIX. Text to n. 21. 52. 60. &c. Neibuhr found, in the Cathedral library of Perugia, a MS. similar in style to the deeds during the Lombardic period, and containing short notices of the contents of the Constitutions, which he considers to be among the proofs of the practical use of the Roman Law between the 7th and 9th centuries.]

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Western Empire; and, the picture cannot fail to be interesting. Almost the whole fell under the dominion of the Germans; for, with the exception of a short interval, only a sma l portion of Italy continued subject to Byzantine controul. The preservation of the old Roman institutions by the Greeks, and their total destruction among the Germans, are the probable anticipations. The reverse, however, is the truth. The Germans respected municipal freedom, and left the cities in the undisturbed possession of their rights, until the arrival of more favourable days for their growth and extension. Not so, the Greeks. (280 b) They stripped civic independence of its principal safeguard, by robbing the citizens of their right to elect their magistracy; and, when Italy afterwards arose from her degradation with renovated splendour, these Greek cities could only obtain a free constitution, by imitating that of the Lombardic Romans.

(280 b) [See below, Chap. XX. Text to n. 3.]

CHAPTER VI.

STATE OF LAW-EDUCATION DURING THE EARLY PART OF THE MIDDLE AGES.

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Rome was the proper seat of Law-education in Ulpian's time, † A. C. 228.

MANY have asserted, that establishments for teaching the Roman Law existed, in different countries, throughout the middle ages. Before examining the authorities on which this opinion rests, it will be necessary to consider the state of Law-education in a general point of view, and to revert to its condition shortly before and after the downfal of the Western Empire. About Ulpian's time, Rome was the proper seat of Legal instruction, but without publicly endowed law-schools, and consequently without any prohibitory enactments against the seminaries of other cities. The teachers of law were, however, favoured with certain immunities; but these were enjoyed at Rome only, and not in the provinces. (1) From this, and other authorities, it is plain, that legal instruction might

(1) L. 6. §. 12. D. de excusationibus. (27. 1.)

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have been obtained also in the provinces. (2) Still, these opportunities do not seem to have been frequent, and Rome is always mentioned, as the proper place of study, for those inhabitants of the provinces, who wished to receive a complete law-education. (3)

And, likewise, in Justinian's reign, along with Constantinople and Berytus.

In A. C. 425, the public school of Constantinople was regularly founded, and endowed with salaried teachers. Twenty-eight of these were assigned to the Greek and Roman Languages and Literature, one to Philosophy, and two to Jurisprudence. (4) There is no evidence of the endowment of a similar school in Rome at this period; (5) although, a Roman place of education undoubtedly existed during the Gothic supremacy, and juris-

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(2) L. 1. §. 5. D. de extraord. cognitionibus. (50. 13.)

(3) Authorities on this subject are collected in Conring diss. ad L. 1. C. Th. de stud. lib. §. 12. [p. 14. seq. Ed. Helmestad. 1674.]

(4) L. 3. C. Th. de stud. liberal. Urbis Romae Constant. (14. 9.) with the Commentary of J. Gothofred. The passage is found also in the Justinian Code—L. un. C. de stud. liberal. urbis Romae et Const. (11. 18.) of which we shall immediately speak.

(5) Many, founding on the words of the title quoted in the preceding note, (Romae et Constant.), have erroneously considered, that a school was established at that time in both cities. The terms of the superscription arose, from the first passage of the title in the Theodosian Code referring to Rome. It does not however treat of the foundation of places of learning, but merely of some police inspection; and it only mentions students generally, without naming those of the law in particular.

prudence formed one of the subjects there taught. Cassiodore, in the name of Athalaric, about A. C. 534, issues an ordinance against the abuses, which had crept into the system of paying the salaries of the instructors; and, upon that occasion, law-teachers are expressly mentioned. (6) About the same time, in A. C. 533, Justinian promulgated his famous constitution Ad Antecessores de Conceptione Digestorum. In it, all establishments for teaching jurisprudence are prohibited, except those in Berytus, and in the chief cities

(6) Cassiod. Var. IX. 21. med. " ..... ut successor scholae liberalium literarum, tam grammaticus, quam orator, *nec non et juris expositor*, commoda sui decessoris ab eis, quorum interest, sine aliqua imminutione percipiat." The newly appointed teachers had frequently been deprived of their salaries. It is commonly assumed, upon the authority of this passage, that in the Roman establishment for education there were at this time, only three teachers; but Conradi (or. de Scholae Juris civ. Rom. fatis, p. 383. 386. at the end of Eisenhart inst. hist. jur. lit. ed. 1763) has shown the erroneousness of this explanation. The meaning is, " that every newly appointed teacher (successor), whether he be Grammaticus, or Orator, or Juris Expositor, shall, &c. The number is therefore left quite indefinite. In a preceding part of the same rescript—doctores eloquentiae are mentioned in the plural number, and also—grammaticorum schola. Moreover, Athalaric reigned, A. C. 526–534; and this ordinance was among the last given in his name, and was probably promulgated very near the end of his reign. Tiraboschi Storia della let. It. T. 3. Lib. 1. C. 1. §. 18.

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of the Empire: (7) an expression which can apply only to Constantinople and Rome. Justinian thus appears to have intended to legislate for the school in Rome; and the incidental and cursory character of this notice is sufficiently explained, from the precarious condition of the Western Empire, owing to the Gothic conquests, which Justinian did not wish even theoretically to acknowledge. (8) It is impossible to imagine any real and direct exercise of legislative power, by the Byzantine Emperor in Rome, before the war with the Goths; and every thing practical in the constitution is accordingly limited to Constantinople and Berytus in Syria. (9) But after

(7) Const. omnem. §. 7. princ. [prefixed to the Pandects] "tam in *regiis urbibus*, quam in Berytiensium pulcherrima civitate;" and afterwards, "extra *urbes regias* et Berytiensium metropolim."

(8) This explanation appears to be more natural than the opinion of Ritter (praefat. T. 2. Cod. Theod. p. 8. med. Lips. 1737), who supposes the quoted passages to have been interpolated or vitiated. The worst interpretation of all is that by Asti, (usu e autorita della ragion civile, Lib. 2. C. 7.) who understands, by the "regiae urbes," the capital of each of the provinces. This is contradicted by many authorities, and among others by L. 6. C. de adopt. (8. 48.) "nec in regia urbe, nec in provinciis."

(9) Const. *Omnem* §. 9. princ. "neque in hac splendidissima civitate, neque in Berytiensium pulcherrimo oppido." § 10. "Et haec omnia in hac quidem florentissima civitate ... praefectus urbis .... In Berytiensium autum civitate ... praeses." Therefore, the opinion of Conradi (l. c. p. 384,) cannot be defended. He reckons, that of the eight Profes-

Justinian had conquered Italy, he confirmed the Roman school, and ordered payment of their usual salaries to the teachers. (10)

But its Law-school became of less importance by the dismemberment of the Provinces.

These general remarks clearly show, that, with the exception of the School at Rome, no other publicly endowed establishment for teaching Law existed in the Western Empire. It is therefore extremely improbable that, in the following centuries, under the German supremacy, when the mental condition of the Romans was certainly not on the advance,

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sors, to whom this constitution is addressed, four belonged to Constantinople, two to Berytus, and two to Rome. It cannot indeed be denied, that a Title of the Code (11. 18.) bears the superscription "de studiis liberal. *urbis Romae* et Constantinopolitanae. But, the Title contains only a single constitution, which had been already confined in the Theodosian Code to Constantinople (see above n. 4. 5.), and its adoption by Justinian shows the exclusive application even more decisively; for, any practical exercise of the Imperial authority at Rome was at that period quite impossible. The superscription of this Title in the Theodosian Code, like many others, has obviously been copied from mere carelessness, into the Justinian collection. Others unnecessarily blame Justinian for absurdly wishing to extend this ordinance to the establishments for education in Rome. Ritter ad Heinecc. hist. jur. P. 1. §. 380. Tiraboschi Storia T. 3. L. 1. C. i. §. 18.

(10) Justiniani Sanctio pragmatica (A. C. 554) C. 22. ". . annonas quae grammaticis ac oratoribus vel etiam medicis, vel jurisperitis antea dari solitum erat, et in posterum suam professionem scilicet exercentibus erogari praecipimus, quatenus Juvenes liberalibus studiis eruditi per nostram rempublicam floreant."

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such schools should have been for the first time erected. Indeed, after the dissolution of the Western Empire, the constant intercourse of the former provinces with each other, or with the capital, e. g. of Gaul with Rome, ceased; and it must therefore be admitted, that no Law-teachers were maintained any longer in the countries thus separated. By what substitute their removal was supplied shall be afterwards examined; but we may here remark, that a great mistake would be committed, if it were supposed, from a comparison with German customs, that supplying the want was either difficult or impossible. According to the German system, all, who are intrusted with law-business, either as judges or practitioners, must receive their education under the regular Law-professors. On the other hand, for the enormous extent of the whole Roman Empire, there were no more than three public establishments for teaching Law, and each of these was provided with only a small number of Professors. (11) In such circumstances, none will maintain, that every person intended for the profession of the law was obliged to frequent

(11) In Constantinople there were, in A. C. 425, two Law-Antecessors, and afterwards four in each of the three establishments. Hugo Rechtsgeschichte 4te Ausgabe §. 310. [9te Ausg. p. 911. Schweppe. Röm. Rechtsgesch. §. 127. seq. Göttingen. 1826.]

these seminaries, or that they furnished the exclusive means of obtaining legal instruction. If such an opinion cannot be adopted, the disappearance of the publicly endowed Law-schools could scarcely have been felt as any deprivation, particularly at a time, when the intellectual energies of mankind were so sunk and enfeebled.

Law was still taught in the ordinary Schools throughout the middle ages.

Nevertheless, (12) this account of the downfal of legal education, after the dismemberment of the Western Empire, applies exclusively to the Law-schools properly so called; for, in many of the ordinary seminaries, the Roman Law, as a branch of old literature, was included in the course of study, and specially taught in connexion with dialectics, throughout the middle ages. The evidence of this change, in the mode of obtaining legal instruction, must be received as quite satisfactory. A notice of an establishment at Toul, in which a knowledge of the Law might be acquired, is found in the contemporary account of Pope Leo IX. † A. C. 1054. It is there said of several scholars: —"Nempe ut primum competit rudibus, decurso artium trivio, non solum claruerunt prosa et metro, verum et forenses controver-

(12) [The translator gratefully acknowledges his obligations to the learned author for an almost new MS. of the remainder of this chapter.]

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sias acuto et vivaci oculo mentis deprehensas expediebant, seu removebant sedulo. Denique quadrivium naturali ingenio vestigantes degustarunt, atque non minimum in ipso quoque valuerunt." (13) In like manner, St Bonitus, from Auvergne, is described by his contemporary biographer, in the eighth century, as " Grammaticorum imbutus initiis nec non Theodosii edoctus decretis, ceteros coaetaneos excellens a Sophistis probus atque praelatus est." (14). Similar accounts have been preserved regarding England. Thus, in the seventh century, St Aldelmus mentions how much time the study of the Roman Law consumed; and, immediately afterwards, states Poetry and Music to be acquirements of still greater difficulty. (15) Alcuin, † A. C. 804,

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(13) Mabillon Acta Sanctorum ord. S. Benedicti. Sec. VI. (A. C. 1000—1100) P. 2. p. 53. infr. See also Hist. lit. de la France T. 7. p. 24. 25. where the passage is thus explained. They studied first the Trivium, then Jurisprudence, and finally the Quadrivium!

(14) Cap. I. Num. 3. in the Actis Sanct. Januarii T. 1. p. 1070. 2. col. supr. Antverp 1643. or Venet. 1734. fol.

(15) S. Aldelmi epistola in Wharton Anglia Sacra, P. 2. p. 6. infr. Lond. 1691. fol. Neque enim parva temporis intervalla in hoc lectionis studio protelanda sunt ei dumtaxat, qui sagacitate legendi succensus legum Romanarum jura medullitus rimabitur, et cuncta Juriscousultorum secreta imis præcordiis scrutabitur. Fossi (Congetture sopra una carta papiracea, &c. p. XXX.), applies this reference to the Pandects; although, if the Text be accurate, it may as easily be con-

when describing the school at York, states Grammar, Rhetoric and Jurisprudence, as subjects included within the course of study. (16) Concerning Italy, likewise, there is a remarkable notice of the course of education pursued in his youth by Lanfrancus, † A.C. 1089. (17) This celebrated person was born in

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nected with the Breviarium. Aldelmus' Epistle has also been attributed to Bonifacius in ed. Serrarii, N. 68. [Bibl. Patrum. vol. xiii. p. 96. c., or] ed. Wurdtwein. Mogunt, 1789, fol. N. 143. with the following important variations on the text: in hoc studio, without lectionis .... qui *solerti* sagacitate ... Jurisconsultorum *decreta*, instead of secreta. Decreta, in particular, is obviously a better reading than secreta, and favours Fossi's opinion; since it plainly refers to the Pandects, and not to the Breviarium. Aldelmus, however, must be considered as the author of this Epistle, in conformity with the statement of William of Malmesbury, from the twelfth century (see Wharton l. c. p. 6. med.) William wrote the life of Aldelmus, and states that the Epistle was addressed to Hedda, Aldelmus' preceptor.

(16) Alcuini poema de pontificibus et sanctis ecclesiæ Eboracensis. vers. 1433—1435. (opp. T. 2. Vol. I. p. 256. Ed. Froben. Ratisb. 1777, fol.

> " His dans Grammaticæ rationis graviter artes
> Illis Rhetoricæ infundens refluamina linguæ
> Illos Juridica curavit cote polire. "

(17) Milonis Crispini vita Lanfranci Cap. 5. (Opp. Lanfranci, Paris, p. 6. 1648, fol.) "ab annis puerilibus eruditus est in scholis liberalium artium, *et legum sæcularium ad suæ morem patriæ.* Adolescens orator veteranos adversantes in actionibus causarum frequenter revicit, torrente facundiæ accurate dicendo. In ipsa ætate sententias depromere sapuit,

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Pavia, and is said to have been instructed in early life in the liberal arts and Jurisprudence, according to the custom of his native city, and to have soon acquired great credit, as a debater of law-questions. The same connexion of law-education with the liberal arts is mentioned, as common over Italy in Wipo's Poem, where he entreats the Emperor Henry III. to introduce a similar system into Germany. (18) The Breviarium also has been illustrated by many glosses, consisting entirely of passages from such of the classical authors, as were generally read in the grammar-schools of the middle ages. (19)

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quas gratanter Jurisperiti aut Judices vel praetoris civitatis acceptabant. Meminit horum Papia." Of these sententiæ, which were plainly nothing else than the law-doctrines embodied in his judicial harangues, a separate work has been formed, by an odd mistake, in the Hist. lit. de la France, T. 7. p. 151.; "il intreprit un recueil de sentences choisies du droit alors en usage, qui lut de grande utilité aux jurisconsultes et aux magistrats qui rendoient la justice."

(18) Wipo in paneg. ad Henric III. (in Canisii. lect. ant. T. 4. p. 167. infr.)

"Tunc fac edictum per terram Teutonicorum,
Quilibet ut dives sibi natos instruat omnes
Literulis, Legumque suam persuadeat illis,
Ut cum principibus placitandi venerit usus,
Quisque suis libris exemplum proferat illis.
Moribus his dudum vivebat Roma decenter:
His studiis tantos potuit vincire tyrannos:
Hoc servant Itali post prima crepundia cuncti."

(19) See below, Chap. VIII. n. 51.

early part of the middle ages; although most Wenck has collected some very remarkable proofs to show, that law cases were discussed in the schools of the middle ages, and jurisprudence conjoined with dialectics, in the same manner as among the old Roman grammarians. (20) Thus, it is said concerning Vacarius, in the well known passage of a Norman chronicle:—"Suggestione pauperum de Codice et digesta exceptos IX. libros composuit, qui sufficiunt ad omnes legum lites que in scolis frequentari solent decidendas." And still plainer in Thomas of Canterbury's Epistles, (21) where the Bishop Henricus Vigornensis writes to the Chapter of Canterbury: "..... Super his omnibus, quae Dilectioni vestrae scribere studui, cum in scholis vestris, Caussidicorum more, Themata inde elicueritis, et juxta oratoriam vel legitimam institutionem Quintilianum vel Papinianum fueritis in argumentis et allegationibus imitati, merita caussarum, ex incude et malleis vestris exilientium, nobis tanquam desideratum antidotum renunciate, etc."

Although only generally, as a branch of liberal education.

Many, however, have maintained the existence of proper schools of law, during the

(20) Wenck Magister Vacarius, p. 55. and his instructive review of his own Work in the Leipz. Lit. Zeitung, 1821, num. 274.

(21) Thomae Cantuariensis epistolae, Lib. 8. Ep. 91. p. 617. ed. Lupus. Bruxellis, 1682. 4to.

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of the evidence in favour of this opinion rests upon the supposed mention of teachers of law, under the names of—Legis Doctor, or other similar expressions. Now, it is undoubtedly true, that, wherever the existence of a law-school is otherwise certain, the appellation "Doctor" stands in close connection with it, and definitely denotes one of the teachers of law, in opposition to the other classes of "juris-periti;" as shall be afterwards proved, when speaking of the school of Bologna. (21 a) But the term also admits of another, and very obvious meaning. Thus, "legem dicere" signifies to judge, or to apply the law, which was the duty of the judicators; (22) and "legem docere" having obviously the same signification, "legis doctor" may be properly applied to a judge, as well as to a teacher. Therefore, from the use of this term alone, no argument can be derived in favour of the existence of a school of law; and by examining a few of the authorities, the exclusive accuracy of this opinion will be at once established.

Legis Doctor, &c. are no proofs of the existence of Law-Schools either in France

In A. C. 689, a King Alanus of Bretagne gave to three of his Council a commission,—to inquire into, and alleviate all the grievances

(21 a) [See below, Chap. XXI.]

(22) L. Salica, Ant. T. 60. (Canc. 11. 101.) e. g. "Dicite nobis legem Salicam,"—and so throughout the whole title.

of his subjects. The names of two of these privy councillors have come down to our time. They were "utriusque juris professores," and it is said, that this must necessarily prove the existence of two law-schools, one for Roman, and the other for Canon Law. (23) But the spuriousness of the deed might be proved merely by the employment of these terms, if other reasons had not already removed all doubts on the subject. A genuine instrument of the Majordomus Pepin, in A. C. 750 or 751, for the benefit of the monastery of St Dennis, narrates—"Sicut Proceres nostri, seu Comitis palacii nostri, vel reliqui Legis Doctores judicaverunt." (24) Nevertheless, the words of this deed directly prove, that by the term Doctores, we are not to understand—Teachers, but Judicators. Judgment is stated to have been pronounced by the Great and the other Doctores; and thus it must be assumed, that, according to this deed, the Great were also Doctores, i. e. Judicators; unless, it be intended to maintain the improbable supposition, of their

(23) "Alanus . . rex dilectis et fidelibus consiliariis nostris Magistris Marinano de Fago et Briaciano de Fontenayo, *utriusque juris professoribus*" . . . Brequigny diplom. N. 210. p. 311. and proleg. p. CVII.

(24) Bouquet Script. T. 4. p. 717. Brequigny diplom. N. 362. p. 501. [See below, Chap. IX. preceding n. 158.]

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being all professors. In like manner, an author of the ninth century speaks of a Placitum at Orleans in such a manner, as to afford an argument in favour of the existence of a Law-school at that place. This Placitum was attended by—" plurimi legum Magistri et Judices;" and afterwards, " aderant namque legum Doctores tam ex Aurelianensi quam ex Wastinensi provincia . . . quidam Vastinensis regionis legis Doctor" . . . (25) But, here also the Doctores are Judicators, as appears both from the nature of their functions at this Placitum, and from mention being made of their residence. They did not all dwell in Orleans, or any other single place, but in different provinces, and districts containing several provinces. If they were teachers, it would be necessary to admit the existence of a much greater number of law-schools, than are found even in the subsequent centuries. This, however is a supposition, which the most zealous de-

(25) Adrevaldus de miraculis S. Benedicti, Lib. 1. P. 2 C. 2. N. 8. (Acta Sanct. Martii, T. 3. p. 308. 2. col. infr.) Another part of the passage, which indeed has a more direct reference to the Roman Law, has been already noticed, p. 126. n. 63. The existence of a Law-school at Orleans is maintained, upon the above authority, by Gyvez,—in Menagiana, T. 1. p. 178.—Similar language is also employed by another chronicler of the ninth century, in Alte jerra rer. Aquitan. III. 9. p. 199. " miseratque in Martiliacum Robertum *legis doctum.*" [See below, Chap. XXI. Text to n. 570.]

fenders of the existence of the early law-schools will scarcely venture to maintain.

Or in Italy.

These and similar expressions occur more frequently in Italy. Thus, the notary, in a Milan deed of A. C. 853, styles himself:—"Ego Hilderatus scriptor hujus livelli et juris magister .... post tradita complevi ac dedi." (26) The words—juris magister, here signify a person possessed of a knowledge of the law, or a lawyer generally; for, there is no evidence of a separate school of law having ever existed at Milan. Mention is made of an "Ubertus Legis Doctor" at Florence in A. C. 1075, and of a "Rodulfus Legis Doctor" in the district of Bergamo, in A. C. 1079. (27) But these, for the reasons already given, are merely judges, and not teachers. Legislator (28) is also frequently employed, and has been erroneously considered in modern times, as a mere term of vanity or ostenta-

(26) Tiraboschi, Storia di Nonantola, T. 2. N. 38. p. 54.

(27) Mur. ant. Ital. T. 1. p. 969. D. 448. inf.—In the same manner, we find in a Papal Privilegium, A. C. 1049, "judicibus legisque doctoribus." (Ughelli, T. 4. p. 446); but the instrument is a forgery.

(28) In A. C. 1047, at Imola, "Albertus et Dominicus Legislatores de Faventia." Fantuzzi, T. 6. p. 29.—The same title is applied, in the twelfth century, to Raymundus de Gena and Jacobus. (Sarti) de claris archigymnasii Bonon. profess. P. 1. p. 28. 47.

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tion; although "legem ferre," like "legem dicere," signifies to pronounce judgment; and the term "legislator" may, therefore, with the greatest certainty, be understood as signifying a judge. (29) Another term of frequent occurrence is Causidicus; which has been also improperly understood to differ from the other expressions, and to signify merely a law-practitioner. (30) It nevertheless bears a similar meaning with the preceding, and is applied to judicators, i. e. to persons employed in the discharge of judicial functions. (31)

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(29) Caroli M. Capit. addita ad L. Long. A. C. 801. (Baluz. 1. 345): "pleraque ... sententia terminata sunt, quaedam vero in nostri examinis arbitrium ad tempus dilata, quorum *judicialis sententia a legislatoribus* .. penitus omissa est." Likewise, in A. C. 1014, at Rome, in an imperial Placitum, (Mabillon ann. Bened. T. 4. p. 705), "cum venerabilibus abbatibus ac ordinariis et *legumlatoribus judicibus*, tam Romanis quam Langobardis."—This has been already remarked by Möser,—Osnabr. Gesch. Th. 1. Abschn. 5. §. 30, not. c. on the authority of Meginhard.—translatio "S. Viti, c. 14.: qui sedem Legislatorum (Judicators) implebant."

(30) Mur. ant. It. T. 1. p. 491. D. (Sarti) de claris arch. Bonon. profess. P. 1. p. 64.

(31) Thus in a Placitum, A. C. 1108, (Ughelli T. 1. p. 354.) "Sedenteque cum eo Corvone judice et Guidone judice *cum aliis causidicis*. Corvo and Guido were "Causidici," and both "Judex" and "Causidicus," here signify a judicator.—Likewise in two Placita, A. C. 1099, Ughelli, T. 1. p. 816. 817. T. 3. p. 87.

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Judex has various significations.

But Judex occurs oftener than any of the preceding terms; and, since it gradually received the most different significations, according to the various circumstances under which the judicial duties might happen to be discharged, we must notice shortly at present some of its most important meanings. In the early times of the Roman Republic, Judex was the title of the supreme magistrate. (32) Afterwards, and during the period of the Great Jurists, the term Judex was most commonly bestowed on those private persons who investigated the facts, and pronounced the judgment. Still, however, the same expression was used, but more rarely, in speaking of the magistrates. (33) Since Constantine, it became the proper title of the governors of the provinces. Judex was applied—to the Counts in the old Lombardic laws, and afterwards—to the elected public functionaries of the Romans in the Lombardic empire, (34) and—to the Judicators, particularly to the elected Scabini, both among the Lombards and Franks, and—to the Dativi, or municipal authorities appointed by the government in the Exarchate. (35) Fur-

(32) Livius III. 55.

(33) L. 1. D. de judiciis (5. 1.) L. 14. §. 1. D. de religiosis. (11. 7.)

(34) See above, p. 81. 264. 411.

(35) See above, p. 277. 357.

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ther, we very often find, during the German period, merely private persons designated by the title Judex, as synonymous with the appellatives already mentioned, or with even more general ones. (36) Judex in these cases signifies a person experienced in the law, or a lawyer generally. This last signification is not new, but the same with that of judicator: for, every person distinguished by his knowledge of the law, was certainly either elected among the Scabini of his community, or appointed to attend the Placita as a Scabinus, by the king or superior judge. (37) Judex was at least not applied to any

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(36) Such general titles of Lawyers are—Juris peritus, Jurisprudens, legis lector, &c. (Sarti) de clar. arch. Bon. prof. P. 1. p. 29. Mur. ant. It. T. 1. p. 401. A. D. T. 5. p. 269. A.

(37) The Judices Domni Regis, Imperatoris, sacri Palatii. Among these, Mur. (ant. It. T. 1. p. 501.), makes a great many unnecessarily fine distinctions; because, the Judices occur in deeds, with all these titles. Thus in Fumagalli cod. dipl. S. Ambr. p. 485. 487; where, Natalis is first styled—"Judex sacri palatii," and then "Judex domni regis." So also on p. 489, 492, the title "Judex sacri palatii" is first applied to Leo, and afterwards that of "Judex domini imperatoris."—Mur., l. c. p. 495, D. 496, considers these Judices, as quite different from the Scabini, who could only be elected by the people, and immediately (p. 498. A.) quotes a deed, which is subscribed by a—Scavinus domni Imperatoris! These Judices are, however, the permanent Scabini of the Emperor or King; and they formed, as it

lawyer who had not previously discharged the duties of a judicator in some of the courts.

All these expressions changed their meaning after the School of Bologna.

It has been deemed necessary to be thus minute in fixing the meanings of these expressions, because, according to the prevalent opinion, they have been understood to signify, sometimes a teacher of law, and at other times a person who had received his education in one of the schools of law; and consequently, on either of these suppositions, they have been considered as proofs of the existence of public establishments, for the teaching of law. While the erroneousness of this doctrine in the early times has been demonstrated, its accuracy, from the period of the foundation of the Bologna school of law, must be likewise admitted. (37 a) "Doctor" then denotes a teacher, and the rest of the titles appropriately belongs to the other Juris-periti, who were not preceptors.

The School of Law at Rome perhaps continued in A. C. 964.

From the previous remarks on legal education and phraseology, Rome and Ravenna must be excepted. It is in itself extremely probable, that the School of Law, which existed at Rome in Justinian's time, continued during the following years. (38)

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were, the bench of Lawyers in the court, while such of the nobles as were present composed the bench of Lords.

(37 a) [See below, Chap. XXI., following n. 113.]

(38) See above, p. 439.

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On this subject, however, a remarkable story is told by Odofredus, a writer of the thirteenth century, who says—that the School of Law, at first established in Rome, was afterwards transferred to Ravenna. This account is supported—by the undeniable traces of the existence of a School of Law at Ravenna, in the eleventh century, and—by the easy and natural removal of this school from Ravenna, to the neighbouring city of Bologna. The circumstances, which immediately preceded the rise of the school at Bologna, must be reserved for the sequel of this work; but, the following passage occurs in a treaty of Otto the Great with Leo VIII., dated from the city of Rome itself, in A. C. 964,—"Synodum constitutam a pluribus viris catholicis, Episcopis et Abbatibus, insuper Judicibus et legis Doctoribus." (39) These Doctores may indeed be the teachers of Law; since it is probable, from other reasons, that a school of law existed at that time in Rome. They may, however, be judges, as in the preceding Frank and Lombardic deeds; and no certain conclusion can there-

(39) Goldast const. Imp. T. i. p. 221. med. Frankf. 1673. —There is a still weaker authority in Anastasius—vita Hadriani I., (Mur. III. 1. p. 185,) "direxit in ejus occursum .... universas Scholas militiae una cum patronis, *simulque et pueris qui ad discendas literas pergebant.*" This passage, no doubt, speaks of an establishment for education, but not of a law-school.

fore be drawn from this passage, in favour of the preservation and continuance of the Roman establishment for legal education.

The Decurions and Scabini connected the study of the law with its practice.

Among the Germans, legal knowledge and instruction stood in close connection with that judicial system, which we have traced in the fourth Chapter through some of its changes. While all the Courts might be frequented as judicators by the people, they were the depositaries of the knowledge of the Law: but, after elected Scabini assumed almost every where the judicial functions, all legal knowledge was preserved within their narrower circle; until, at a later period, instruction on the most difficult points was given by these colleges of justice themselves.(39 a) The study of the law always stood in close connection with its practice, and a separate course of education in the theory of jurisprudence no where existed. In the Roman cities, on the other hand, the members of the Curia, at an early period, assisted in the administration of Justice as assessors, or filled exclusively the magisterial offices; (40) and in these limited associations, as at a later period among the German Scabini, all knowledge of the law was undoubtedly cultivated and preserved, by a similar study of its traditionary workings in practice.

(39 a) [See above, p. 278. 394.]

(40) [See above, p. 88.]

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The Notaries also kept alive a knowledge of the law.

The Notary-department also contributed to preserve and extend a knowledge of a peculiar branch of the law, both among the Romans and Germans. In republican Rome, the management of extrajudicial law-matters, from the strict observance of old forms which was necessary, formed an employment of particular importance, and was a chief part of the duty of the highly estimated order of jurists: i. e. of the leading and most influential Romans. After the decline of freedom, that department, having become merely mechanical, sunk into a sort of handicraft, and was performed by the Tabellions. (41) The name of Tabellion was long preserved in the Exarchate; for, among the Lombards, Franks, etc. the term Notarius was very early used to denote the same profession. (42) The Notaries were accustomed to follow fixed forms, which they copied literally, in so far as the peculiarities of each case would allow. Among the Franks particularly, these forms were often collected into separate books, which we shall afterwards notice, when examining the history of their law. From this cause, there arose a great uniformity and regularity in the written legal proceedings; and not only expressions and forms, but many legal ideas and

(41) See above, p. 53. 335.

(42) [See above, p. 406. n. 236. and below, Chap. XXIII. Text to n. 25.]

abstract law-propositions were preserved and circulated by the travelling Notaries. This explains, why law-doctrines are often met with in unexpected places and times. (43) Great precautions are, however, necessary in illustrating the history of the law from this source; for, many things, preserved in real deeds and books of forms, ought not to be considered as current doctrines or propositions, but must be viewed merely as antiquated forms, thoughtlessly preserved and often ludicrously disfigured. (44) Several examples of this truth will occur afterwards; but, a few may be noticed at present, by way of illustration. In contracts concerning landed property, it has always been the custom, from the earliest times, to specify the neighbouring proprietors by adding the words—Inter affines fundum, N. etc. Commonly, four neighbours were enumerated. This expression—inter affines was gradually changed to—in terra fines; and, from that alteration, there arose the very common form of—cum suis justis ac certis in terra finibus, (45) as the

(43) F. C. Conradi parerga, p. 497.

(44) Mur. ant. Ital. T. I. p. 666. D. Marini papiri, p. 315.

(45) Examples from the ninth and tenth centuries are found in Fantuzzi T. 1. p. 86. 92. 105. 122. 129. 130. 222. 224. &c.—Marini papiri p. 315 not. 6. supposes, that the Notaries had formed from the—'inter affines' a substantive

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proper expression for regular and accurate boundaries. Farther, it was certainly the practice, from the earliest period, after mentioning the four marches, to add a provision for the event of any of the neighbours having been erroneously specified—" et si qui alii affines sunt et qua quemque tangit et populum," i. e. or whosoever may be the true neighbour, whether a private individual,—ager privatus, or the Roman people—ager publicus. (46) Now, this last form, which it was the fashion to express merely by the initial letters Q Q T E T P P, continued in use, until the eleventh century, when

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' Interaffines;' and that the text should therefore be cum .. Interaffinibus. But, if all the above quoted and many other deeds be not falsely printed, their text contradicts that supposition. Besides, there is less difficulty in attaching a signification to the words—' cum justis in terra finibus,' than to the expression ' cum justis Interaffinibus.'

(46) Marini (Papiri p. 305. not. 4.) refers the words ' et populum,' to the ' via publica,' or ' limes publicus;' but ' ager publicus' was certainly, in the times when the forms were probably composed, of much greater and more general importance. Marini himself quotes some inscriptions, in which the ' populus' are mentioned among the adjoining proprietors, and this is another confirmation of the above opinion. Since, in the authorities ' limes publicus' and ' via publica,' when among the conterminous proprietors, are always specially described, we may with certainty presume, that when ' populus' is used on such occasions, it has a different meaning. [See below, Chap. XII. Text to n. 30.]

certainly no one ever thought of a Roman 'ager publicus.' These initials are often absurdly filled up, thus—quidquid est in perpetuum, or quotquot ex poblicis. (47)

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(47) Marini (papiri, p. 294. not. 6. 2. col. med., and p. 305. not. 4.) quotes the entire formula from inscriptions. It may likewise be found complete among Marini's deeds, in N. 93. l. 7. N. 113. l. 10. N. 114. l. 12. N. 120. l. 14. N. 122. l. 15.; but imperfect, in N. 89. 130. and in the deed referred to, p. 294. not. 6. The most recent of these, A. C. 1015, reads 'qq. termm. ppli. tang.' p. 294. n. 6. 2. col. infr.

END OF VOLUME FIRST.

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ERRATA.

p. 2, at bottom, for "most celebrated," read "highly esteemed order of."
p. 35, at middle, for "Consulships," read "Consulates."
p. 39, n. 46, at end, for "C. 12," read "C. 13."
p. 40, at top, for "Consul," read "Consularis."
p. 48, at bottom, delete "only."
p. 49, n. 87, at end, for "*nominari.*" read "*nominari.*"
p. 51 and 52, for "Excerptor," read "Exceptor."
p. 57, at top, for "Decurio," read "Duumvirate."
p. 60, at middle, for "quality," read "equality."
p. 70, n. 136, at end, insert "Lupi Cod. Dipl. Bergom, p. 411."
p. 85, n. 184, at end, for "65," read "71."
p. 112, at end of n. 24, insert "Struv. Hist. Jur. p. 368."
p. 125, at beginning of n. 60, insert "L. Lothar. Cit."
p. 131, at end of n. 73, and beginning of n. 88, for "§." read "S."
p. 149, at top, for "territory subject to the jurisdiction of the city," read "Ducatus."
p. 150, at middle, for "territory," read "Ducatus."
p. 159, n. 124, delete "l. §."
p. 309, n. 73, at bottom, for "Præfectures," read "Provincial cities."

The following ought to be enclosed within [ ].

p. 90, the two last lines, and latter part of n. 194.
p. 92, n. 196 a, and latter part of n. 197.
p. 98, n. 207 a.
p. 137, n. 85 a.
p. 153, n. 111, last paragraph.
p. 218, n. 71 a.
p. 239, latter part of n. 112, from "Millar," &c.
p. 242, latter part of n. 119, from "He there," &c.
p. 243, latter part of n. 121, from "The Term," &c.

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